United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

77-7069

ORIGINAL
WITH PROOF
OF SERVICE

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

BALLON, STOLL & ITZLER,

Plaintiff-Appellant,

-against-

THOMAS J. DUFFEY, HERMAN A. LUEKING, JR., ALBERT D. MATHESON, WILLIAM J. KENNEDY, JOHN A. MURPHY, JACK A. SHEETZ, JOHN SPICKERMAN, FRANK E. FITZSIMMONS, ROBERT HOLMES, DONALD PETERS, WILLIAM PRESSLER, ODELL SMITH, ROY L. WILLIAMS, FRANK H. RANNEY, and JOSEPH MORGAN, Not Individually But as Trustees Under a Common Law Trust of the Central States Southeast and Southwest Areas Pension Fund,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX
Volume II of II pages A-406 to A-837

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/23/76

bsbr 1

AFTERNOON SESSION

2:00 p.m.

(In open court.)

RONALD ITZLER, resumed.

DIRECT EXAMINATION (Continued)

BY MR. KNIGIN:

Q Mr. Itzler, as a result of all of the discussions thatyou had, all the conferences that you attended, did there ever come a time when you prepared an agreement, proposed agreement between the Central States Southeast and Southwest Areas Pension Fund and Neisco?

A Yes.

Q What was the pupose of that agreement?

A The agreement referred to certain of the arrangements had amongst the fund and the Horvath interests, that were the subject of those meetings: Montmartre, George Horvath, Ernest Horvath's employment, and the Neisco Chapter XI.

Q Was this prepared by you at anybody's instructions?

A Oh, yes.

Q Whose?

A The instructions of the persons present at those meetings: Mr. Ballon, Mr. Radom.

Q Were the terms to be included in the agreement discussed with you?

A They were discussed at the meetings.

Q Did you make notes?

A I did.

Q When you drew the agreement, did you draw the agreement in accordance with your recollections and your notes?

A Yes, sir.

Q After you prepared the document of agreement, what did you do with it?

A I forwarded copies of them to Mr. Vogel and to Mr. Polish. Mr. Vogel was then New York counsel for the fund. Mr. Polish was counsel for the Horvath groups.

Q To your knowledge, were those agreements ever signed?

A They weren't.

Q Have you kept the original of that agreement, in the file maintained by you at Ballon, Stoll & Itzler?

A Yes, sir.

Q Preparatory to this action did you have a chance to review that file?

A Yes.

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Q Did you see the document that you are now referring to in that file?

A Yes, I did.

Q I show you this document and ask you whether or not this represents the document which you prepared at that time under the circumstances you have just described and which you have since found as resident in the file at Ballon, Stoll & Itzler?

A Yes, it is.

Q Can you tell from looking at the document presently before you, Mr. Itzler, approximately when it was prepared by you?

A July of 1970.

MR.KNIGIN: May I have this marked for identification, please.

xx (Plaintiffs' Exhibit 15 was marked for identification.)

Q Mr. Itzler, I'd like to read to you Paragraph 7 of that agreement.

MR. SCHWARTZ: If your Honor please, I must object to reading to an agreement that is not in evidence.

THE COURT: That is true enough. Do you offer the document, Mr. Knigin?

MR. KNIGIN: Yes, we will offer it at this time.

THE COURT: Show it to Mr. Schwartz.

MR. SCHWARTZ: I object to the admission of the document in evidence since it is a draft which was not accepted and it has no probative force of anything.

If the witness wants to testify to the discussions which he based this on that is a different matter, but just offering the agreement drawn ex parte is really irrelevant and incompetent to prove anything.

THE COURT: On what basis is the document offered?

MR. KNIGEN: It is offered, your Honor, to show the understandings that Mr. Itzler says he reached in his conversations with the various fund members in relation to the Neisco proceeding, and the document that he drafted as a result of those discussions.

This is not something that was done in contemplation of any action in which the plaintiff and this defendant were concerned, or involved, this is a document that has been --he has testified has been resident in the files of Ballon, Stoll & Itzler since 1970, long before we knew of any failure on the part of the fund in connection with what we claim to be their obligation.

THE COURT: You offer it not as an agreement in force but as a contemporaneous writing or indication of his understanding?

MR. KNIGIN: That is correct, your Honor.

MR. SCHWARTZ: I must make the point that I don't think it is admissible to bolster his testimony since he hasn't given any oral testimony yet, and in any case, it might be used to impeach him, or if he is impeached it might be used possibly to resurrect his testimony, but I don't think there is any basis for offering a contemporary ex parte document prepared by a witness to bolster testimony that he expects to give.

MR.KNIGEN: Not ex parte, your Honor. He claims that he sent it to Mr. Radom on behalf of the fund.

THE WITNESS: No, Mr. Vogel.

MR. KNIGIN: Mr. Vogel on behalf of the fund, the very attorneys who are representing the defendants in this action.

MR. SCHWARTZ: He got no acceptance of it. That doesn't prove anything.

MR. KNIGIN: Do you have an objection to it, Mr. Schwartz?

MR. SCHWARTZ: He got a rejection. It wasn't signed. That is obvious.

This is nothing more or less than a proposal on the part of Neisco, and this is not the proper way to prove it.

THE COURT: I will receive it for what it is worth.

xx (Plaintiffs' Exhibit 15 was received in evidence.)

MR. SCHWARTZ: May we ask the witness whether there is a covering letter showing the transmission of that to the people he says it was delivered to?

THE COURT: Yes. I will permit that question as part of the voir dire.

You may put that to him now, Mr. Knigin.

Q Mr. Itzler, at the time that you forwarded this agreement, or proposed agreement and other agreements, did you have a forwarding letter with them?

A Yes.

Q I show you this document and ask you if this represents the covering letter that went with this document as well as a couple of other documents.

A This is it.

Q By the way, what was the date of the letter?

A July 27, 1970.

MR.KNIGIN: Proceed, please.

xx (Plaintiffs' Exhibit No. 16 was marked for identification.)

MR. SCHWARTZ: No objection.

THE COURT: Received.

xx (Plaintiffs' Exhibit No. 16 was received in evidence.)

BY MR. KNIGIN:

Q Mr. Itzler, just so there be no confusion, I just want to understand something, as to this letter marked 16 in evidence, you were transmitting three agreements, an agreement between the fund and Neisco, between Neisco, Horvath and the fund and between the Fund, Montmartre and 4815. By the way, is 4815 a union?

A No, 4815 is one of the corporations that owned the ground lease or the land upon which the Montmartre Hotel was located in Miami Beach, Florida. It corresponds to the address on Collins Avenue, 4815 Collins Avenue, Miami Beach.

Q I call your attention to the paragraph which states "It is imperative we get moving on the execution of these agreements since the continued existence of Neisco depends upon our confirming a plan. The confirmation of the plan, of course, depends upon the execution of these agreements."

Could you explain that for us?

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A May I see the letter, please.

A Surely.

(Pause.)

A I frankly have no recollection of -- I think I recall. In July of 1970 -- by July of 1970 we had promulgated a plan acceptable to the creditors committee. The creditors committee required that a deposit, good faith deposit of $50,000 be deposited with an agent of the committee, or of the court so as to assure the creditors that the funding of the plan would be forward.

The fund didn't advance that $50,000, and I believed that the execution of the agreements would induce the fund to advance that money at that time, and it was necessary for the consents to the arrangement to be filed. They were solicited and were in the hands of the creditors committee, who refused to file those concents until the fund put up that which they had promised, a $50,000 good faith deposit.

MR. SCHWARTZ: I move to strike out "that which they had promised", unless the witness can testify to a conversation with someone on behalf of the fund.

THE COURT: On what basis do you testify that the fund had made this promise?

THE WITNESS: My recollection was refreshed, your Honor, upon reading the transcripts of the court hearing before Judge Babbitt, this was reported to Judge Babbitt by me in the presence of Mr. Vogel and Mr. Radom, and it is on that basis that I make the statement.

MR. SCHWARTZ: May we have the transcripts.

THE WITNESS: I can give you the dates that --

MR. KNIGIN: By the way, your Honor, as far as the transcripts are concerned, apparently Mr. Schwartz has still not made the inquiry into them. We did during lunch today and found that all of the transcripts, the original transcripts, are out of their file and apparently in the referee's position at the present time.

THE WITNESS: No.

Q Mr. Itzler, you made the inquiry.

A I inquired. The envelope which says "Transcripts" is empty and none in the referee's office has any idea where they are.

As a matter of fact, I was told that they may have been requisitioned by your Honor.

THE COURT: We made an inquiry, but we have none of the file in chambers.

MR. SCHWARTZ: May guess is that they are up at Jundge Baonsal if any place.

THE WITNESS: That could be.

THE COURT: I will disregard the answer, Mr. Schwartz, unless there is credible independent evidence proving such a premise.

MR. SCHWARTZ: As a matter of fact, Mr. Knigin in his office has a full copy of the transcripts.

MR.KNIGIN: We just had delivered to us, your Honor. less than five minutes ago -- you may have seen the young lady walk into the courtroom -- a series of copies of the minutes of the proceedings before Referee Babbitt. I know them to be incomplete. The reason I know that is because I have already analyzed them, and reviewed them.

I think that they stop somewhere toward the end or late fall of 1971. Of course, this proceeding continued into the early part of 1972, March. So that to that extent they are not complete. I don't know how many in between copies are missing because I have never made a complete perusal of that.

Right now we are sitting here, your Honor, Mr. Ballon is making an overview of them and they are -- we will be very, very happy to make them available to Mr. Schwartz if he would like to have them at different recesses during the course of this proceeding.

As I say, I want the Court to fully understand that we are not representing them to be complete.

THE COURT: I will say to counsel for both parties that the only thing I know for sure about the bankruptcy proceeding transcripts is that I don't have them.

To the extent that either party wishes to rely upon them, they have got to be made available to me and the proof in this case is going to be closed fairly soon. This case has been hanging fire since 1972 and that shoudl have given counsel sufficient time, one would think, to assemble and have ready for submission to me whatever transcripts or other documents counsel may feel is important to their case.

MR. KNIGIN: We have done that, your Honor.

MR. SCHWARTZ: I would like to make one comment, your Honor. Mr. Knigin is always saying that he'd be glad to let me look at the transcripts to see that they show what he says they show.

I don't particularly want to do his homework. If he has excerpts that say something, let him show me those excerpts or give me the page numbers so I can check them out. I am not goingto read through several thousand pages of testimony, of which 99 percent is irrelevant.

THE COURT: I am not going to do anybody's homework. I have passed beyond that stage of life now.

I am going to decide the case on the evidence which counsel lay before me. Let's get on with it. The transcripts will either be produced or not.

BY MR. KNIGIN:

Q Mr. Itzler, do you recall who it was on behalf of the fund that indicated that they were going to make the payment of $50,000?

A No, I don't.

Q Do you recall when this conversation took place?

A It took place subsequent to the promulgation of the plan with the creditors committee, but prior to the solicitation -- prior to the submission of the consents to the plan by the persons who solicited the same.

Q Where did it take place, please?

A It probably took place -- I believe it took place, I am quite sure it took place at a creditors committee meeting, at which the plan was promulgated.

Q Was that in this court?

A No, it was not. It was in a private meeting at an office.

Q Do you recall any discussions in this court concerning the $50,000?

A Yes.

MR. SCHWARTZ: May we have the name of whoever spoke on behalf of the fund.

Q Do you know who spoke on behalf of the fund, Mr. Itzler?

A No, I do not.

MR. KNIGIN: If your Honor will allow me, I make reference to a portion of the minutes -- I didn't want to introduce them at this time, but just for the sake of continuity, of the proceedings before this court on September 17,1970, a --

MR. SCHWARTZ: What page?

MR. KNIGIN: A proceeding at a point in time, your Honor, when Mr. Vogel was present in the courthouse -- in the courtroom. Mr. Leinwand, who was the attorney for the creditors, stated "The union has led us to believe" --

MR. SCHWARTZ: Page,please, Mr. Knigin.

MR. KNIGIN: I don't have the page number, your Honor. I'd have to stop. go through the minutes and find the page number. I know this was taken from the minutes of September 17, 1970.

MR. SCHWARTZ: Minutes of September 17th are a few hundred pages long, your Honor.

MR. KNIGIN: I am representing to this Court that we have removed this excerpt from that particular minutes.

THE COURT: You go ahead and spread it on the record. If there is a problem about it --

MR. SCHWARTZ: The reason I object to it, your Honor, is because I would like to know what comes before it and what comes after. This is taken out of context of a 200 page transcript. I don't think we have to read 200 pages to find out just where this is if counsel is reading testimony certainly at the very minimum should be able to give us the page number that is it taken from.

THE COURT: Yes, I think at the very least, if use is to be made of the minutes in the bankruptcy proceeding, it will simply have to be accompanies with a prper page reference in the transcript, Mr. Knigin.

MR. KNIGIN: May we, your Honor, just for the sake of continuity, because I don't intend to read these right now in any event, but again for the sale of continuity, because there seems to be some issue raised as to Mr. Itzler's last answer, may I just ask the Court's indulgnece to read one statement made by Mr. Leinwant at that hearing and then let it be subject to confirmation and I will supply the page number before we again meet?

THE COURT: I am not happy about it but you go ahead.

MR. KNIGIN: "The union has led us to believe that there is $50,000 being put up and they are going along and financings this settlement and we have been going along on that assumption."

That is what Mr. Leinwand said.

MR. SCHWARTZ: I move to strike that out. That is rank hearsay. Mr. Leinwant is not here and we can't cross examine him.

MR. KNIGIN: Your Honor, nobody asked whether we could cross examine Mr. Leinwand. The point is that Mr. Leinwand said this in court in the presence of all of the representatives of the fund. There is nothing that transpires in which the fund in any way indicates that that is untrue. This is being said before the bankruptcy judge.

Your Honor, there comes a point in time when there is something that has to be less than sacrosanct in Mr. Schwartz' opinion. They can't continuously make statements, remain silent and have Mr. Schwartz say that doesn't prove anything. It proves a lot of things were going on where a very sophisticated fund, represented by highly sophisticated lawyers, were standing around letting the creditors, the debtors, the Court and the attorneys believe something, and I think sooner or later they have to be held at least accountable for those acts.

THE COURT: You take the position, I suppose, that an authorized representative for the fund, making a statement in open court to the extent that that statement is inconsistent with the fund's present position, it can be admitted as an admission against interest.

MR. KNIGIN: You must recall, your Honor, this statement was not made by an authorized representative of the fund. This statement was made by an attorney who was representing -- who represented the creditors. As such -- my point is that here it is being made in open court in the presence of not only Mr. Radom, Mr. Vogel, but as I recollect, there was one other person on behalf of the fund present on that occasion, and everybody is just standing around and nobody is in any way saying to the referee "Look, that's not true, we didn't do it. That's not what we said", they are just standing there mute. I submit that that is a reasonable basis upon which adult people functioning in a court of this kind would accept that as a representation of the fund.

MR. SCHWARTZ: All we have at the moment is Mr. Knigin's summary of 200 pages of testimony, andI have no way of knowing whether it is correct or incorrect or anything else.

I would like to have the page number so we can see the context in which the statements claimed were made.

I think that is the minimum requirement that he should comply with.

THE COURT: I will reserve on the motion to strike until a more complete and proper preparation of the transcript is made. If none is made I will strike the answer.

MR. VOGEL: Your Honor, may I interrupt a moment to make a record for something extraordinary that has just happened in the courtroom, and your Honor was otherwise engaged.

As we were sitting here approximately 60 seconds ago, a gentleman walked into the room and walked up to Mr. Radom and handed him a civil subpoena to appear in a case No. 73 Civ. 1248 with the judge's initials DBB, demanding him to appear in this courthouse in the case Ernest Horvath v. Thomas J . Duffey. That gentleman who served it is known to me to be an employee of Jack Polish, who is a witness shceduled to appear in this matter.

MR. SCHWARTZ: I think the service is certainly valid. Mr. Radom is here as a voluntary witness in this case and he has immunity from service in any other case while he is here on this case to be a witness.

THE COURT: He's been subpoenaed with a different matter, you say, Mr. Vogel?

MR. SCHWARTZ: Yes.

MR.VOGEL: Your Honor, it is a matter we promised to afford you a copy, the matter of Ernest Horvath's claim before Judge Bonsal.

MR. RADOM: I think it is an improper introduction upon the controversy before the Court at this time, and that is my prime objection. I think the attorney who served me is acting highly improperly.

THE COURT:It may be so, but it seems to me that that application will probably have to be made to Judge Bonsal against the background of a full disclosure of what is going on here.

Do you take the position that I can do anything about this?

MR. VOGEL: No, your Honor. We just wanted the record to be made that it occurred in this courtroom at this time.

MR. KNIGIN: May I say for the record that I know nothing about this nor do the plaintiffs know anything about this, nor did we even know that the service was taking place.

THE COURT: Just so the record will be absolutely complete, I didn't know anything about it either.

Let's get on with this case, gentlemen.

Q Mr. Itzler, getting back to this -- the series of agreements in this letter, when you prepared the agreement, did you prepare it as you understood the agreement to be?

A Yes, I did.

Q Now, I want to read to you Paragraph 7 --

A I may add -- let me complete that answer. There were items that I didn't put into the agreement, items thatwere tentatively agreed upon that were excluded from our drafts intention naturally because there were further items to be discussed with respect to those particular things.

Q Did you make mention of that in your letter?

A Yes, I did.

Q Now, I want to read to you paragraph 7 of the agreement between Neisco and Southwest.

"When called upon by Neisco, the fund shall deliver to the Court appointed distributing agent in the proceedings for an arrangement of Neisco, the fund is required to confirm the arrangement in said proceedings, including but not limited to the fund's necessity for dividends to general unsecured creditors,and administration expenses of the proceedings and payments required by taxing authorities. The fund shall cause its duly authorized representatives to execute such documents and make such court appearances as shall be required by the confirmation of the arrangement."

Now, Mr. Itzler, was that your understanding at that time?

A It certainly was.

THE COURT: Take it one step further, Mr. Itzler, was that your understanding of what had been agreen between all the participatnts that you have described at this series of meetinjs you told me about?

THE WITNESS: Absolutely, sir.

THE COURT: All right.

Q By the way, did anybody from Mr. Vogel's office every communicate with you following the forwarding of that copy to them and say to you, as relates to Paragraph 7 which I have just read, that that was an incorrect statement?

A No, sir.

Q That was not the agreement reached by the parties?

A No, sir.

Q Were those agreements ever signed?

A No, sir. Not to my knowledge.

Q Was ever a reason given for those agreements not to have been signed, just yes or no?

A No.

Q During all of this period of time when these agreements were being drafted, did Mr. Vogel continue to appear in the courthouse in connection with the Neisco bankruptcy petition?

A On virtually every appearance.

Q Could you tell us, Mr. Itzler, on the appearances in the bankruptcy court in 1970 and into 1971, were there any discussions before the referree as to how this entire arrangement was going to be funded?

A Yes.

Q What was the nature of those discussions?

A It was stated unequivocally to the Judge --

Q By whom?

A By myself, by mr. Vogel.

Q Each time that you spoke, was Mr. Vogel there?

A Substantially each time. I can't be sure he was there at every appearance, but --

Q If he was absent was Mr. Schaeffer there?

A There was somebody from his office there at every appearance, or Mr. Radom was there at every appearance, one or the toher.

Q And in addition was Mr. Radom there?

A Mr. Radom was not there every appearance. I believe Mr. Vogel appeared a few times when Mr. Radom didn't.

Q Was eitherMr. Radom, Mr. Vogel or a representative of Mr. Vogel's office present?

A Yes, sir.

Q In that context, what did you say about this funding arrangement?

A Precisely what had been set forth in that agreement, that the pension fund would make the funds available to fund the plan and the administration expenses.

Q By administration expenses what items were you referring to?

A Talking about the fees for counsel, accountants, secretary, referee's salary and expense fund and whatever incidental stenographic costs there may be.

Q By fees what did you mean?

A Allowances to counsel for the creditors committee, counsel for the debtor, secretary to the

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creditors committee and accountants.

Q During all the proceedings that we have just discussed, did there ever come a time, other than the point in time when the announcement was made that the fund would not participate on September 2nd, 1971, but up until that date, did there ever come a time when either Mr. Radom, Mr. Vogel or representative of Mr. Vogel's office stated to the Court that the pension fund would not fund the plan?

A There was indication that they might not fund the plan unless Internal Revenue Service had affirmed at a stipulation acceptable to the fund. It indicated that.

Q How long prior to September 2, 1971 was that?

A I can't tell you now.

Q If I was to refresh your recollection that the time of the circumstances of the September 2, 1971 meeting included a request by the referee at the opening of the Assistant United States Attorney as to whether or not a solution concerning the IRS claim had been reached, would that serve to refresh your recollection?

A It would not. The negotiations with Internal Revenue took a considerable peirod of time, and I am not sure at what time during those negotiations by the fund to the bankruptcy court.

Q Taking the IRS negotiations, were they ever resolved?

A Yes.

Q When was that?

A Can I see the excerpts of the transcript?

Q I'd rather you didn't right now, Mr. Itzler, because we have a problem concerning their admissibility.

A It will refresh my recollection.

Q I will show them to you and we will have them marked for identification with the Court's permission.

(Pause.)

A September 2, 1971.

MR. KNIGIN: May we ask that these excerpts be marked for identification.

THE COURT: Those are excerpts of what?

MR. KNIGIN: These are excerpts of court proceedings, minutes of court's proceeings.

THE COUR:T They can be marked for identification.

xxxxx

(Plaintiff's Exhibit No. 17 was marked for identification.

MR. SCHWARTZ: May we havea copy

of them?

MR. KNIGIN: Yes.

Q Mr. Itzler, to the best of your recollection, who was it that had negotiated the settlement of the IRS claim?

A Mr. Vogel and Mr. Radom.

Q This was a claim against Neisco, is that correct?

A Yes.

Q Mr. Votel and Mr. Radom, who did they representative in the proceeding?

A The Pension Fund.

Q Wouldn't the negotiations of the IRS claim on behalf of Neisco be a matter for the attorneys for Neisco?

A Ordinarily, yes.

Q And that was you firm?

A Yes.

Q Could you describe for us the circumstances by which your role in that regard was replaced by that of Mr. Vogel and Mr. Radom?

A Well, since the pension was going to pay the amount which was negotiated, they subordinated my interests and the interests of Neisco to the interests of the fund, and they negotiated that particular item.

Q Was an agreement as to the amount of the claim worked out?

A Yes, it was.

Q Was that by September 2, 1970?

A Yes, it was.

Q Now, Mr. Itzler --

A 1971.

Q 1971. Mr. Itzler, were you present when that determination -- that negotiation was finalized?

A I was present when it was reported to the Court that it had been finalized.

Q Were you present when it was finalized?

A No, I was not.

Q So at the time that an agreement was reached you weren't even there, is that correct?

A That is correct.

Q And who were the parties to that agreement on the Internal Revenue claim?

MR. SCHWARTZ: If your Honor please, there was no agreement. If there was I'd like it produced. There were negotiations and an exchange of letters, but I have yet to hear that there was an actual agreement signed.

THE COURT: It seems to me I just heard that there was an agreement.

If the defendants disagree with that, it can be esxplored.

MR. SCHWARTZ: If there was an agreement I'd like to see it produced.

THE COURT: Was there a written agreement?

MR. KNIGIN: Nobody said it was a written agreement.

MR. SCHWARTZ: There can't be an agreement with the government unless it is approved by the Attorney General in writing.

THE COURT: That is something to be explored on cross examination.

Q Who were the parties to the agreement, Mr. Itzler?

MR. SCHWARTZ: I must object to that on the ground that there is no proof that there was an agreement.

MR. KNIGIN: I will withdraw the question, your Honor.

Q Mr. Itzler, did the Attorney General ever submit a consent in this proceeding, in the Neisco proceeding, as far as the tax claim was concerned?

A I don't know if a written stipulation was filed, I don't know.

Q Did the U.S. Attorney for this district state in open court before the refereee that an agreement had been reached?

A Yes.

Q What was her name?

A Susan Freiman.

Q Was that made upon the record?

A Yes.

Q Was that made at the September 2nd, 1972 session of the court?

A Yes.

Q Was Mr. Vogel present?

A Yes.

Q He knew about this representation, didn't he?

A Yes.

Q Did Miss Freiman, in reporting the agreement to the Court, indicate between whom it was reached?

A Yes.

Q Who did she say?

A Mr. Vogel, Mr. Radom, representatives of the pension fund.

Q Did she report to the Court that the

United States Attorney was satisfied?

A Yes, she did.

Q Did she report to the Court that the pension fund was satisfied?

A Yes, she did.

Q Was Mr. Vogel standing there when she made that report?

A He was.

Q Did he state anything to the contrary concerning her representation relating to the settlement of the IRS claim?

A No, he didn't.

Q Immediately following that discussion upon the record, did something surprising occur?

A Yes, it certainly did.

Q What was it that occurred?

A A statement was made by either Mr. Vogel or Mr. Radom that the pension fund was not going to finance the plan.

Q What did the referee say?

A He was convicted by his own morals to say everything, but he was very upset. He indicated that the fund was remiss at this time, after 18 or -- I think he said 18 months, but it probably was more -- for them at this time and for the first time to see that they were not going to finance the plan.

Q What did Mr. Vogel say, if anything?

A I think the immediate response was Mr. Radoms.

Q What did he say?

A He said it was a decision made by the fund, and they didn't want to go forward.

Q Did he say why?

A Yes, he did.

Q Why did he say?

A He made a statement to the effect that the fund, after considering the fact that Mr. Dorfman had been indicted, and that Mr. Horvath and Mr. Dorfman had a relationship, the fund didn't with to go forward with the financing of the plan.

Q Did they say anything about Mr. Horvath's cooperation?

A Yes, they did.

Q What did they say?

A They said that Mr. Horvath had testified in support of the indictment.

Q On behalf of whom?

A The government.

Q What if anything did the referee then do?

A Well, the referee asked of me what my next steps would be, and I implored the judge to continue the matter so that I would have an opportunity to discuss it further with the representatives of the fund.

I was non plussed and had no idea that this was forthcoming.

His initial reaction was to deny that request. I renewed it. And it was again denied.

I then asked for alternatives, I asked that the proceeding be dismissed rather than adjudicated a bankrupt -- rather than Neisco be adjudicated a bankrupt so that Neisco could pursue what might have been a cause of action against the fund for breach of agreement with respect to the financing of the plan.

The Judge declined to permit me to do that.

I made further fervent pleas with respect to permitting Neisco to continue as a debtor in possession and bring such a lawsuit, and eventually I prevailed and the Judge adjourned the matter for a period of time so as to enable me to meet with the fund and find out exactly what their motivations and intentions were.

Q Between September 2, 1971, Mr. Itzler, and the time you received that letter that is already in evidence from Mr. Vogel, in which he advised you that the fund would not participate in the funding -- I think that was in March of 1972 -- during that period of time did you have conferences with the representatives of the fund?

A On numerous occasions.

Q Did you have conferences with Mr. Vogel?

A I did.

Q What was the reason they told you that the fund wasn't going forward?

A They told me that the fund had decided it was not in their best interests to go forward.

Q Did they give you any other reason other than that?

A They mentioned the Dorfman indictment.

Q Did they say anything about Masmo?

A Not to my knowledge.

Q Did they say anything about the IRS?

A No, sir.

Q Did they say anything about Ernest Horvath's contract?

A No, sir.

Q Did they say anything about Montmartre?

A No, sir.

Q By the way,, during this period of time, did they continue to countersign on the checks of Neisco?

A Absolutely.

Q Whose decision was it that Mr. Radom and Mr. Vogel attempted to settle the Internal Revenue Service claim againast Neisco?

A Mr. Radom's and Mr. Vogel's.

Q Did you acquiesce in their request?

A I did.

Q Were you authorized by your client to do that?

A I was.

Q Did you advice the Court that Mr. Radom and Mr. Vogel were attempting to make that settlement?

A Miss Freiman did. The United States Attorney.

Q By the way, Mr. Itzler, you prepared the schedules that were filed subsequent to the petition, is that correct?

A Yes, I did.

Q And when you prepared them, were they accurate in all respects?

A To the best of my knowledge they were, yes.

Q Did you read them carefully?

A I believe there were amendments to the schedules made subsequent to this.

Q When you discussed the manner by which the attorneys' fees were being paid, was that a fair representation of how they were being paid?

A Oh, yes.

Q How many years have you been filing petitions and schedules in bankruptcy, Mr. Itzler?

A 15.

Q Has that been in all the Chapter XI proceedings?

A Yes, sir.

Q I mentioned W.T. Grant. Did you also file on behalf of Associated Transport Service?

A Associated Transport, Eastern Freightways, American News, Ancorp National Services, Miracle Mart, Inc., Western Shoppers City, perhaps the biggest Chapter XI ever filed in this district.

Q Does your firm also -- were you involved in Grace & Robinsons?

A We were counsel to the trustees in bankruptcy.

Q How about John's Bargain Stores?

A WE were counsel to the creditors committee and counsel to the receiver and presently about to be appointed counsel to a trustee in bankruptcy.

Q In any way did you deviate or differentiate from the normal manner in filing schedules in this proceeding than in the other proceedings that you just mentioned?

A No, sir.

Q You heard Mr. Ballon testify as to cases in which third party funds were utilized for funding a Chapter XI?

A Yes.

Q Do you have any recollection of any others? I understand that he got that information from you. Are there any others?

MR. SCHWARTZ: I can't hear you, Mr. Knigin.

MR. KNIGIN: Whether he had any other third party examples.

A There are others, but it is very difficult to recollect the fee arrangements in any one particular Chapter XI.

Q Could you, Mr. Itzler, with any degree of certainty tell us the percentage of cases in which third party funding occurs?

A I would say about 20 to 25 percent.

THE COURT: In a Chapter XI?

THE WITNESS: In a Chapter XI proceeding. That is our experience. It may vary with other attorneys.

Q Can you remember other than in this case where a lien creditor was supplying the third party funds?

A I can't recall, I am sorry.

Q To the best of your recollection where there others in your experience?

A Oh, yes.

MR.SCHWARTZ: I object to that, your Honor. He can't remember the names.

A I can't remember the names.

THE COURT: Do you recall that they occurred although you can't remember the precise names?

THE WITNESS: Yes, sir. Unequivocally. This is a classic example of funding. Where a lien creditor, authorized to preserve or protect his interest, funds the Chapter XI.

THE COURT: He is doing that in an effort to get something more out of it than if it passed into a straight liquidation.

THE WITNESS: Precisely.

Q Along the line of the judge's inquiry the lien creditor is looking to getting some more out of it for himself, would you classify the Neisco case as such a case?

A Oh, yes.

Q Was the lien credit motivated by any self-interest?

A Of course.

Q What was the prectical benefit to the lien creditor in funding this XI?

A Were the XI not funded and the company adjudicated a bankrupt, or was the fund to foreclose on its security interest, there would undoubtedly be a deficiency to the fund. However, as contemplated, a continued Neisco would enable the fund not only to recover that which it invested toward the promulgation of a plan but that which had been invested prior to the filing of the petition.

Q Did you as part of your responsibility as attorney for thedebtor in possession make a lien search in connection with the lien field by the debtor -- by the fund?

A Yes, sir.

Q Did you find it to be in good order?

A I didn't make the lien search.
I caused it to be made.

Q Did you get a report that it was in good order?

A Yes, sir.

Q As part of your function as the attorney for the debtor in possession did you make that known to the Court?

A I don't recall whether I made it known to the Court.

Q When would information of that kind normally be reported to the Court.

A Normally it would not be reported to the Court. It would only come up before the Court if in fact I found that the lien was not valid.

Q How about on the promulgation of the plan?

A No, it wouldn't be reported to the Court on the promulgation of the plan.

Q By the way, Mr. Itzler, in your experience as an attorney, when do you report to the Court arrangements in which attorneys' fees for your office are going to be paid by third party funds?

Q Immediately prior to the submission of an order of confirmation, which is the final act of a a Chapter XI proceeding, it is the order of discharge, if you will, the debtor must deposit it with the bankruptch court's appointed distributing agent, the appointed distribution agent, fund's necessity to pay those sums which are due to creditors under the plan, all classes of creditors, and must also deposit the amount required to pay attorneys' fees and other allowances per order of the Court.

If an arrangement is made by an outside -- what outside third party for those administrative expenses or allowances to be paid, a waiver of deposit must be executed by the debtor -- by the person to whom the allowance is payable, and in that waiver of allowances, or waiver of deposit, it is required that there be set forth that the waiver is permitted, what arrangements are being made to pay the person making the waiver, and by whom the payment is being made.

It would be done immediately before the confirmation of the arrangement. Perhaps as the day that the order of confirmation is signed.

Q Was that order that you just described ever done?

A No, it was not.

Q Why?

A We never got to the submission of the order of confirmation.

Q Why?

A We didn't have the funding to fulfil the obligation to put up the necessary money to fulfil the plan.

Q Why?

A The pension fund refused to make it available.

MR. KNIGIN: You may inquire.

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CROSS EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Itzler, you prepared a document which has been marked Defendants' Exhibit A, the order, pension and affidavit for approval of the retention of your firm as attorneys?

A I did.

Q At that time you were bound by the provisions of general order 44?

A Yes.

Q Are you familiar wiht the language of general order 44?

A Yes, sir.

Q Does that language require you to state in the petition and the affidavit of counsel that there is no connection between between the attorney and any person having an interest adverse to the estate?

A It does.

Q Did you so state in your papers?

A I did.

Q At that time was there a connection between your firm and the pension fund?

A No, sir.

Q Was there an alleged contract between your firm and the pension fund?

A Yes, sir.

Q You regard that as a connection?

A Not in the context of general order 44, sir.

Q In what context would you regard a contract as a connection?

A Pardon?

Q In what context would you regard it as a connection?

A If I represented --if our firm represented the interests of the pension fund directly, I would say that there was a connection.

Q Does the general order use the word "conflict of interest" as well as connection?

A if you would show me the general order I am sure I could tell you much more easily.

Q Do you state in your affidavit, apart from stating you had no connection, with any adverse party, you represented no conflicting interest?

A I believe I did.

Q Aren't those two different categories not necessarily encompassing each other?

A I am sorry, I don't understand your question.

Q Isn't the category of conflict of interest a separate category from connection?

A May I see a copy of general order 44?

Q I will show it to you in just a moment. I am asking you a question now as to the use of words, not necessarily the general order.

A I am sorry. Would you repeat the question?

(Read.)

THE WITNESS: I am sorry, I still don't understand your question.

THE COURT: Let me try. I have your affidavit before me. In one paragraph on the first page you swear that neither you nor any member of your firm has any connection with the creditors.

On the second page you swear that neither you nor a member of your firm represents any interest adverse to the debtor in possession.

I think what Mr. Schwartz is inviting your attention on is whether, in view of the fact that those words are used in different paragraphs on different pages, they may be addressing different subject matter, and that there may be a difference between an adverse interest, as referred to on page 2, and a connection, as referred to on page 1.

Is that what you were getting at, Mr. Schwartz?

MR. SCHWARTZ: Yes, sir.

THE COURT: I thought it might be. Is there a distinction? If so, what is it?

THE WITNESS: I don't believe there is a distinction.

Q Look at general order 44 and see if it does not contain two separate sentences, one regarding connections and one regarding an adverse interest (handing).

A All right. I see it. Yes.

Q It does.

Now, as an adverse interest, is not the interest of a lien credit always adverse to the estate and to the general creditors?

A "Always" is a long time. I suppose it can be adverse, not necessarily so.

Q Is it never not adverse?

A Yes.

Q Can you give us an illustration when it is not adverse?

A It certainly isn't adverse if the creditor is fully secured.

Q Were the creditors in Neisco secured at all?

A Pardon?

Q Were the creditors, the general creditors in Neisco secured?

A No.

Q Well --

A I am saying if the secured creditors are fully secured the interest may not be adverse.

Q Isn't it always adverse in the sense that if the liens are not defective they can't be set aside and the money made available for general creditors?

A Then they are not secured creditors as among or as between that secured creditor and general unsecured third parties.

Q Isn't it the duty of the trustee to check into the perfecting of liens and the validity of liens?

A Absolutely.

Q To find out whether they are valid liens?

A Absolutely.

Q Isn't that obligation adverse to the interest of a lien creditor?

A Not if the lien is in fact valid and subsisting.

Q Aren't you confusing the responsibility with the outcome?

A Pardon, sir?

Q I say, aren't you confusing the responsibility to check the situation with tye outcome?

A I am not confusing them at all, no.

Q You testified that you made a lien search of the fund's liens.

A I caused one to be made.

Q Why did you do that?

A Pardon?

Q Why did you do that?

A Because it is good practice.

Q Was that because it was the obligation of the debtor in possession, having the powers and obligations of the trustee, to check the liens to see that they were valid?

A That is one reason, perhaps the least.

Q If you had found that some of the fund's liens were not properly filed, would you have had an obligation to challenge those liens?

A Absolutely. Either challenge them or advise all parties involved with respect thereto and perhaps arrange some other outcome, not necessarily a challenge.

Q You coudn't permit them to exist in preference to the rights of the general creditors, could you?

A Oh, yes, of course I could.

Q Would it be your obligation not to?

A It would not be my obligation -- it would be my obligation -- let me explain what I am saying. It would be my obligation to advise all parties of the existence of the alleged infirmity, and if it were in the best interest of creditors and the general estate, an attack of the lien might not be required.

Q Doesn't the existence of the problem itself create an adverse interest, a conflict of interest?

A No, s ir. I have no conflict. My interest -- I had no conflict whatsoever.

Q You have the duty, don't you --

A To do what?

Q To challenge the lien if it can be challenged?

A No, sir, I don't have a duty to challenge the lien. I have a duty to investigate the propriety and the validity of the lien, and act accordingly.

Q You think youcan do that fairly and impartially where you are being paid by the individual that you are investigating?

A Pardon, sir?

Q Do you think you can make that investigation impartially and fully in the interests of the estate and general creditors where the party you are investigating and might have to challenge is the one who is paying you fees?

A I have no doubt that I could accomplish that, if your question is hypothetical.

THE COURT: Mr. Itzler, take the case where the third party lien creditor is proposing to fund the plan, and as counsel for debtor in possession in the course of your inquiries you discover a possible infirmity in the lien creditors lien, or liens, in those circumstances could you, for the good of the estate, or for general creditors, give any consideration to the possibility that if you attack the lien creditor might change his mind about funding the plan so that you would then have killed the golden goose that you hoped was going to lay an egg; is that a possibility in this kind of context?

THE WITNESS: Oh, yes, it is a possibility. But as I said before, your Honor, a good practioner does not necessarily seek litigation. Sometimes you don't kill a fly with a bomb. If in fact -- this is again hypothetical -- if in fact it would be in the best interests of creditors, because of the funding of the plan by the pension fund, to work an arrangement on full notice to all unsecured creditors, all parties affected, which would work to the benefit of those creditors as well as the pension fund, it woud not necessary be incumbent upon a debtor in possession to attack the lien.

Have I made myself clear?

THE COURT: I think so. What you are saying is that whether or not, having discovered an infirmity of the lien, an out and out attack is made on its validity may depend upon the circumstances of each case.

THE WITNESS: Precisely. It may well be in the best interest of general creditors to permit the lien to exist, if general creditors would receive more by the funding of a plan, by a secured creditor, than they would upon the adjudication of the debtor as a bankrupt.

I'm not saying that that happens all the time nor that it happens often, but it is certainly something that a careful practitioner in my field should look into. It is not automatic that an infirmed lien be attacked.

Q Isn't that decision, Mr. Itzler, one to be made by the bankruptcy judge on full disclosure of the facts?

A No.

Q -- to himand t o all of the creditors?

A No. That is a decision to be made at the threshold by counsel to the debtor in possesssion who you have likened to a trustee.

Q Aren't you likened to a trustee by express provision of the statute?

A To some extent, yes.

Q What do you mean to some extent --

A If you read the statute carefully you will see that if there is a conflict between Chapters I through VII and Chapter XI, the trustee's duties do not pass to a debtor in possession.

Q Does the Section 342? Bankruptcy Act put the burden on a debtor in possession to have the same responsibilities and powers as a trustee?

A To the extent that there is no conflict between the provisions of Chapter I through VII and Chapter XI.

Q Isn't it true that a conflict is not a question of the outcome of the facts but a division of loyalty, of loyalty and representation?

A No, sir.

Q In your opinion as an expert in bankruptcy, it is that you can represent people whose interests might be adverse and do justice to both?

A Of course not.

Q Isn't that what you were doing in this case?

A Absolutely not. I didn't represent the pension fund nor had I in the past, nor have I since.

Q When you learned that Dorfman had been convicted because of Horvath's testifying that he bribed him, did you check in to see whether any of these loans were induced by bribe that might be set aside in the interest of the general creditors?

A No, sir. I learned that in September 2nd, '71.

Q The case was still open, wasn't it?

A Yes, sir.

Q You still had the right to make that decision and bring that investigation and suit, if necessary?

A Pardon?

Q You had the right to make -- to pursue that line of action, didn't you?

A No obligation.

Q You have an obligation as attorney for the debtor in possession to do whatever you could to enhance the estate for the benefit of general creditors?

A My obligation was to -- was only to protect the interests of Neisco, Inc.

Q And Neisco, Inc. includes the general creditors of Neisco, Inc., does it not?

A No, sir. They were represented by counsel.

Q Do you mean to tell me as an expert in bankruptcy that a trustee in bankruptcy has no obligation to protect the general creditors?

A Sor, this is the conflict that I have spoken

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about before. If there is a conflict between the provisions of Chapters I through VII, and Chapter XI, then the -- then the duties of a trustee don't pass to the debtor in possession.

THE COURT:Ye s, but but is there a conflict in this context? I understand what the duties of a trustee in Chapters I through VII are. Is there some different language in respect to Chapter XI which limits or abrogates those responsibilities in respect of the debtor in possession?

THE WITNESS: Yes, sir, I think Section 342 says that You will have to forgive me, I don't remember it by heart.

I do't recall exactly where, your Honor, but there is a statement in Chapter XI of the Bankruptcy Act, but I can't just put my finger on it, that if there is a conflict between the provisions of Chapters I through VII and Chapter XI then Chapters I through VII should prevail.

THE COURT: I don't doubt that for a moment. What I am doing is taking the inquiry one step further and trying to figure out if there is a conflict.

Q Is there any statute or rule that you can cite to us which limits the obligation of a debtor in possession under Section 342, where he has the rights and obligations of a trustee, to check into the validity of a lien creditor with respect to the liens?

A Can I point one out now?

Q Yes.

A They do exist. No, I cannot point one out now.

Please repeat the question. Maybe I didn't understand it. Would you?

(Read.)

THE WITNESS: Oh, no, no, there is no limitation to such obligation. The obligation is absolute.

Q Then there is no conflict between Chapters I and VII on the one hand and XI on the other in this area?

A Not at all. I think this obligation is absolute.

THE COURT: We will break for five or ten minutes now.

(Recess.)

Q Mr. Itzler, you testified about third party fee payments. Do you believe -- I think you said you couldn't recall any other case by name in which a lien creditor paid a fee?

A No, I said that I did recall where a lien creditor paid a fee --

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Q But you couldn't recall the name of the case?

A I remember it quite vividly, the lien creditor was Sentry Factors, in Abbe Rabiner, that case.

Q Was that pursuant to an agreement made before the commencement of the proceedings?

A Yes.

Q Was it disclosed to the court at the time that application was made for the retention of counsel?

A I have no recollection.

Q CAn you recall the terms of that agreement?

A No.

Q Was this case, that is the agreement with t he fund, the pension fund, a situation where the -- you claim the agreement was to be made -- the payment was to be made through a third person?

A I don't recall. I believe so.

Q Do you recall being examined before trial in this action on October 9, 1974?

A Vividly.

Q Do you recall these questions and answers which I will read to you: I will read from page 21, line 22: Mr. Knigin, would you give the court your copy of the transcript of what you have, we sent it back to you.

MR. KNIGIN: I don't have the ribbon copy.

MR. SCHWARTZ: I don't have the ribbon copy either, your Honor. It may be on file.

THE COURT: Go ahead.

MR. SCHWARTZ: "Q Did you ever have a conversation with anyone on behalf of the pension fund beyond a reasonable doubt to the payment of your fees and in representing Neisco?

"A No.

"Q Did you ever have any such conversations with Mr. Radom?

"A No.

"Q Or Mr. Vogel?

"A No.

"Q Do you know whether Mr. Ballon did?

"A Yes.

"Q And with whom did he have such a conversation?

"A In my presence he had a conversation with Mr. Radom, with Mr. Melman, with a gentleman from the pension fund whose name I don't recall, but I can describe him as a gentleman with one arm.

"Q With one arm?

"A That is correct.

"Q A trustee --"

MR. KNIGIN: I have found the ribbon copy that you were looking for. I apologize. Let me hand it up to theCourt now. Thank you.

MR. SCHWARTZ: We are now on page 22, your Honor. Lone 20:

"Q A trueee?

"A Yes, I believe so. There have been other persons, I believe, Mr. Ruggendomp and anotehr gentleman whose name I don't recall right now.

"Q Now, can you fix the date of that conversation?

"A No, I don't think I can. There were a few meetings of that nature.

"Q Were they about the filing of the petition or after?

"A The ones I attended were after the filing of the petition.

"Q Where did they take place?

"A In our offices.

"Q Was that in early 197p?

"A Possibly.

"Q Can you tell us what was said by each of the persons present, to the best of your recollection?

"A No. I could only characterize the nature of the conversation.

"Q Well, can you tell us what Mr. Radom said?

"A No.

"Q Can you tell us what Mr. Ballon said?

"A No.

"Q Can you summarize the conversation?

"A Yes. VArious topics were discussed, the nature of a plan, if one could be promulgated, the participation of the funds in the implementation of the plan, the payment by the fund of the moneys necessary to implement the plan, paying the administration expenses including our fees. The fees of the creditors committee counsel, referees' salaries and expense fund, accountant for debtor and creditors committee and other administration expenses. The necessity for borrowing of funds for the operation of the debtors business during the Chapter XI proceeding. The status of the negotiations with Internal Revenue Service with its payment in connection with its claims and a multitude of other matters relative to Chapter XI and the successful completion.

"Q Was that conversation had prior to or after entry of an order permitting the debtor in possession to borrow money from the fund for operating purposes as against certificates of indebtedness?

"A I can't tell you which conversation took place when. There was absolutely a meeting prior to the order authorizing the borrowing of money by Neisco from the fund.

"Q What specifically was said at this meeting about the fund pays your fees?

"A I can't tell you. I don't recall what was said at which meeting. There were numerous meetings.

"Q Can you recall if it was said at any meeting?

"A Yes.

"Q What was said?

"A I just told you the items just designated which were discussed at all of the meetings. Some were discussed at some meetings, some were discussed at other meetings, some were discussed at all. It is totally impossible for me to categorize what was said at each meeting.

"Q I show you a copy of a letter which has been marked Defendants' Exhibit B and ask you whether that refreshes your recollection as to any discussion?

"A It does refresh my recollection as to what was said at what meeting. It merely confirms the statement as to what I said before as to what was said at various meetings."

A I can't hear you, Mr. Schwartz.

Q "Q Can you now tell us what was said with respect specifically to your firm's fees?

"A Yes. It was stated inequivocally the pension fund would make available funds necessary to pay all administration expenses including our attorneys' fees.

"Q By making all funds necessary, do you mean make the funds available to the debtor in possession?

"A Pardon? No. The fund would pay us.

"Q Directly?

"A That is correct."

Is that your testimony?

A Yes.

Q Was that your best recollection at the time you gave it?

A Yes.

Q In the course of these questions you said, and this is on page 24, your Honor, line 22, "There was absolutely a meeting prior to the order authorizing the borrowing of money by Neisco from the fund".

Do you recall that?

A Yes.

Q When was that --

MR. KNIGIN: What page, Mr. Schwartz?

MR. SCHWARTZ: 24, line 22.

Q When was the order entered authorizing the --

MR. KNIGIN: Excuse me. I don't know what counsel just did, your Honor, there is a question and there is an answer at that location. He has read part of an answer.

MR. SCHWARTZ: I read the whole question and answer previously. I am coming back to ask the witness about this answer.

MR. KNIGIN: You are going to inquire again about this answer.

MR. SCHWARTZ: Yes.

Q When was it filed?

A The order?

Q The order permitting borrowing?

A I believe it was filed simultaneously with the filing of the petition, or very shortly thereafter, perhaps a day.

Q That was November 24th, 1969?

A Correct. You have had no conversations at all with anyone on behalf of the fund prior to November 24th, 1969, did you?

A No, I didn't. I think that if you will read that transcript just a page or two further you will see that I correct the statement I made.

Q Would it be fair to state that this particular statement is inaccurate?

A That particular statement was inaccurate, yes.

THE COURT: The statement on page 24, line 22?

MR. SCHWARTZ: Yes.

THE WITNESS: Yes, that was inaccurate and I believe it is correct a page or two forward in that very same transcript.

Q I will continue where I left off on page 26, line 14. The letter referred to, Exhibit B in the deposition, is the same document which has been marked in this trial as Plaintiffs' Exhibit 7.

"Q Is there anything in this letter which does indicate the fund would pay you any fees directly?

"A I don't know. I will read it again.

"Q Yes.

"A The only reference in the letter to any administration expenses is at the top of page 1. I can't characterize it as to what it means, I didn't write the letter.

"Q Was the letter written by Mr. Ballon?

"A Apparently it was signed by Mr. Ballon, that appears to be his signature."

THE COURT: Mr. Itzler, is it your testimony today that is your understanding that the fund would be paying your firm's fees to you directly?

THE WITNESS: No, that is not my testimony today. My testimony today will differ if I am asked that question.

"THE COURT: I just did. What is your testimony on that point?

"THE WITNESS: My understanding of the agreement is that the fund would make available the funds necessary to fund the plan, including administration expenses, and the vehicle by which it would be paid, or the thousand that itwould be paid -- in which it would be paid would be determined some time before confirmation of the arrangement. That was an open item.

THE COURT: Read that back, will you, Mr. Zulzer.

(Read.)

THE COURT: Thank you.

MR. SCHWARTZ: I go back to page 6, your Honor. Line 9.

"Q Did you have any discussion with George" -- and I assume that is George Horvath -- "as to the retaining of your firm to file the Chapter XI proceeding?

"A Generally, yes.

"Q Was there any discussion about who would pay the legal fees of your firm in that connection?

"A Yes.

"Q Can you tell us what that discussion was?

"A You mean the discussion with George Horvath and myself?

"Q Yes." I will skip Mr. Knigin's objections and colloquy. I go to page 7, line 4.

"A We requested a retaining eee and we were told a retaining fee would be paid to us by a corporation owning the Montmartre Hotel."

MR. KNIGIN: When was this?

THE WITNESS: Immediately preceding the filing of the petition."

"Q Did you receive such a payment?

"A Yes, we did.

"Q What was the amount of the payment?

"A I believe $25,000.

"Q And do you recall the approximate date you received it?

"A I guess it was immediately prior to filing of the petition, a day or two before.

"Q Was the Montmartre -- was that the Montmartre Hotel?

"A That is correct.

"Q Was that a corporation that George Horvatz operated in Florida?

"A There were various corporations involved in the Montmartre Hotel, some where owenrs of the ground lease, some where owners of the lease on the building, one was an operating company, I am not quite sure which one you are talking about.

"Q Do you recall which one paid you the $25,000 retainer?

"A No, I don't."

Did you have any other discussions with George Horvath about the fee that your firm would want for filing the petition, aside from the retaining fee?

A No, sir.

Q Did you have any discussions with him about -- withdrawn.

On your direct testimony this morning I think you testified to about six conferences that you attended which which there was discussion about the fee arrangement?

A Yes.

Q Did that fee arrangement ever vary from one conversation to another?

A No.

Q Was there anything unusual about the arrangement that required it to be discussed every time you got together?

A No.

Q Do you have any explanation for why it may have come up at every meeting, at those six meetings?

A It was important to us.

Q Did you regard it important enough to get a letter or a memorandum from the fund confirming it so that it wouldn't have to be discussed everytime you got together?

A We never anticipated that such a letter would be required.

Q Did you ever ask for such a letter?

A No.

Q Do you have any recollection of the dates of these meetings which you testified to as having attended rather specifically this morning?

A I have no independent recollection.

Q What did you use to refresh your recollection?

A Exhibit 12 for identification. Plaintiffs' Exhibit 12 for identification.

Q Does that show any meetings at which you were present prior to November 29 -- November 24, 1969?

A I don't believe so. May I check, please?

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Q Yes.

(Pause.)

THE WITNESS: I may have been present at the meeting of November 20th.

Q That is not a meeting with anyone on behalf of the fund, is it?

A No.

Q I am talking about meetings at which the fee arrangement was discussed with members of the fund.

A I wasnot present at any meeting prior to the filing of the petition in which the fee arrangement was discussed.

Q Were you present at any meeting between the filing of the petition and December 29th when you filed schedules at which the fee arrangement was discussed?

A I think so.

Q Can you give the date?

A I gave them once. Let's see if I can do it again. In which the fee arrangement was discussed?

Q Yes.

A If I recall correctly, there was one on December the 5th. I think that was the only one before the end of the year.

Q You say there is an entry on December 5th?

A Correct.

Q Which is the entry?

A "Attended conference with client. One and one-half hours."

Q Was that a conference with the fund or someone on behalf of the fund?

A Yes, I believe so.

Q Who?

A I think I toldyou that it was Mr. Radom and I believe Mr. Eisenrod was there and Mr. Ruggendomp.

Q Were they the clients?

A Pardon?

Q Were they the clients?

A No. The client was George Horvath.

Q On your deposition before trial you produced a certain number of yellow sheet which were marked Exhibit H at that time, which I understand recorded the work and time done by you and other members of the firm in connection with this matter which are transposed and summarized in this exhibit, which is now Plaintiffs' Exhibit 12 for identification.

A They recorded some of the work, not all of it.

MR. SCHWARTZ: I ask counsel kindly to produce the papers which were marked Exhibit H on the deposition before trial.

MR. KNIGIN: What papers are they?

MR. SCHWARTZ: The yellow sheets.

Q. Do you have any sheet --

MR. SCHWARTZ: May I have this marked for identification as an exhibit, your Honor? It is -- I can't tell you how many sheets, but it looks like approximately two or three hundred.

THE COURT: Mark the whole folder with a single letter.

xx

(Defendants' Exhibit I was marked for identification.)

MR.KNIGIN: By the way, I would like the record to indicate that Mr. Itzler has already testified on his deposition that this last Exhibit 1 for identification was utilized and then reduced to one composit, which is Exhibit -- which was the exhibit --

THE WITNESS: Exhibit 12.

MR. KNIGIN: Which is Exhibit 12 for identification. This is merely the source doucment from which that exhibit was prepared.

MR. SCHWARTZ: I think it would be helpful if counsel didn't make a statement of that type in the presence of the witness.

MR. KNIGIN: That is just terrible. Counsel has done exhaustive examinations on this. He got those responses when he inquired of the witness, he is fully aware of that.

MR. SCHWARTZ: I am questioning the witness about it and I don't think you ought to --

THE COURT: I don't think this wort of exchange is necessary. It is not bothering me and it is not going to mislead me.

BY MR. SCHWARTZ:

Q Can you select out of the papers constituting Defendants' Exhibit I for identification your work sheet for December 5, 1969, reflecting this conference?

THE COURT: This is a conference in December, Mr. Schwartz?

MR. SCHWARTZ: This is a conference which the witness claims he had on December 5th at which Mr. Eisenrod and Mr. Radom were present.

(Pause.)

THE WITNESS: Yes.

Q May I see it?

A Surely.

Q Is this your handwriting or Mr. Ballon's handwriting?

A Mr. Ballon's.

Q On your deposition didn't you testify that the won who did the work, sir, made the entries on these sheets?

MR. KNIGIN: If that is a question I would wish counsel to demonstrate to the Court, as he asked me to do, some foundation for the statement. I think it would be appropriate that he state where on the deposition the witness stated, as he alleges, where he prepared that sheet.

MR. SCHWARTZ: Were the items of work reflected on this paper which you have produced items done by Mr. Ballon?

THE WITNESS: Yes.

Q They are not items of work done bh you?

A You are incorrect -- your statement is incorrect.

Q Is there any entry that you made of any work you did on December 5th, 1969?

A I don't believe so.

Q So you recollection that you were at a meeting on December 5th, 1969, is not based on my document that you have before you now, is that correct?

A No, that is incorrect.

Q What is it based upon?

A It is based upon the diary sheet of December 5th, 1969.

Q Made by Mr. Ballon?

A That is correct.

THE COURT: Does that sheet say you were there, Mr. Itzler?

THE WITNESS: No, it does not.

MR. SCHWARTZ: May I have that sheet marked for identification as a subsidiary to I.

xx (Defendants' Exhibit I-1 was marked for identification.)

BY MR. SCHWARTZ:

Q Does your name appear anywhere on that sheet?

A No, sir.

Q Does the name of Sol Eisenrod appear anyplace on that sheet?

A No, sir.

Q Does the name Joseph Radom appear anywhere upon that sheet?

A No, sir.

Q Does the entry "Conference with client" appear on that sheet?

A It does.

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Q And that is the only entry on the sheet that relates to a conference with anyone?

A That is right.

THE COURT: Mr. Itzler, correct me if I am wrong, but according to my notes, when you were describing the December meeting you said it was attended by yourself and Mr. Ballon and Mr. Radom and Mr. Horvath, but that there were no discussions at that time with regard to funding or administrative expenses, that it was just preparatory to a general creditors' meeting, is that this meeting of December 5th?

THE WITNESS: That's a different meeting. There was a meeting on -- bear with me -- December the 10th. I will correct one statement I made, however, I believe I did say that Mr. Matheson was present on December 15th, and I withdraw that. My recollection is incorrect. I don't believe Mr. Matheson was here on December the 5th. I only saw Mr. Matheson one time, and I believe I saw him at a later meeting. My recollection was incorrect.

Q May I read from the deposition of the witness before trial. Page 62.

MR. SCHWARTZ: Will you give his Honor the ribbon copy.

MR. KNIGIN: The reason that I made the search before, your Honor, is because I did recall in the back of my mind that in one instance we did in fact get the ribbon copy. That was the sole instance, the one that I gave you. There are two more sets of minutes relating to Mr. Itzler of which we only have a carbon copy. I'd be very happy to give you mine if it would be of any assistance. I'd just soon have you checking the reading as me. Maybe that would be a better way.

THE COURT: If you will permit me to do that, sure.

MR. SCHWARTZ: This is the section of December 16, 1974, page 62. Line 21:

"Q Will you explain the procedure used in your office for making up these yellow sheets to record the time?

"A Are we talking about the time Neisco was being administered?

"Q I am talking about the yello sheets that you have produced."

For the record, those are the yellow sheets which are now Exhibit I for identification.

"A They vary. Sometimes due to the administration of the Neisco proceeding, our -- my procedure as opposed to office procedure changed. It is general office procedure that the gentleman who is handling the matter makes out the diary sheet at the time the work is expended. During the administration of the Neisco proceeding I personally as opposed to all other attorneys in the office changed my methods. I used dictation machinery when I dictated a letter or a document or did an item of work, I dictated it into my machine the diary entry and whoever transcribed that particular tape would make the diary entry for and on my behalf. We found -- I found that more efficient.

"Q Did that include the time you spent in conferences?

"A Yes, sir.

"Q So that I assume we will find your handwritten sheets in the early part of the chronology and Miss Goodman's handwriting or whoever did it --" I was interrupted by Mr. Knigin. There was an answer "Well, I don't have access to the dictating -- when I don't have access to a dictatng machine, I will write it down myself so that hopefully we won't lose the time."

Is that a fair statement of the procedure used in getting up these sheets?

A It is not quite complete.

Q Would it be fair to state that your time, to the extent that it is recorded, will either appear on a yellow sheet in your handwriting or on a yellow sheet in Miss Goodman's handwriting?

A No, that is the instance in which it is not complete.

Q How is it not complete?

A When Mr. Ballon and I, or myself and some other member of our firm work together, one or the other makes the diary entry. When working with Mr. Ballon, it was his practice to make the diary entry.

Q Did you state anything to that effect on your deposition before trial?

A I guess not.

Q You said you had a meeting with Mr. Radom before the creditors meeting on December 10th?

A Yes, sir.

Q Is that reflected in your record of time?

A Not specifically, no.

Q You have a record on December 10 "Attended meeting with Jack Polish".

A Yes.

Q Would you challenge Mr. Radom's testimony if he says that he was not in New York on December 10th and didnt' attend that meeting?

A No, I would not challenge his testimony.

Q I think the next meeting you testified to was February 24th, 1970 at which time you said you and Mr. Ballon both were present. Do you recall that?

A No, I don't recall that. Yes, I do recall that.

THE COURT: What date, February 24th?

MR. SCHWARTZ: February 24, 1970.

Q Will you pick out of Exhibit I your sheet for the entries on that date?

A It doesn't seem to be in chronological order. I can't readily pick it out. It doesn't seem to be in chronological order. Oh, February 24th was that?

Q Yes.

A I am sorry, I am looking at January. Forgive me.

Yes.

Q That is in your handwriting, isn't it?

A It is.

MR. SCHWARTZ: May we have that sheet marked for identification as I-2.

xx (Defendants' Exhibit I-2 was makred for identification.)

Q Is there any reference on that sheet to Mr. Ballon's presence at the meeting?

A No.

Q Am I correct in recalling your testimony a little while ago that where you and Mr. Ballon both attended he usually made the entries in his handwriting?

A You are correct.

Q Is there anything in Exhibit I for identification in Mr. Ballon's handwriing for February 24, 1970?

A No, thereis not.

Q The next meeting I think you testified you attended was April 6, 1970. Do you have the sheet for that meeting?

A Yes, I do.

Q Whose handwriting is that in?

A That's Mr. Ballon's handwriting.

Q Does that make any reference to your being present at the meeting?

A It does not.

Q Is there any sheet signed by you, your handwriting, for that particular date?

A No, sir.

Q We come to a meeting on June 9, 1970 --

THE COURT: Before we leave the April 6th meeting -- is that what we were just talling about --

THE WITNESS: Yes, sir.

THE COURT: What is the entry on the sheet that refers to the April 6th meeting.

THE WITNESS: "Conference. Client with Radom," which I am sure was Radom "and partner, Matheson, Sol Eisenrod, Irving Raddendorf, which I am sure is Ruggendorf, and Joseph Radom." again.

THE COURT: That's the complete entry for that meeting?

THE WITNESS: Yes, sir. "Three hours."

Q On June 9, 1970, do you have an entry of a meeting?

A Pardon?

Q Do you have an entry of time on June 9, 1970?

A Yes.

Q And that is the last meeting I think you testified at which you attended?

A Yes.

Q At which fees were discussed?

A Yes.

Q Whose handwriting is that entry in?

A I can't seem to find it. June 9th.

Q Right. I am sorry. I have it. A -- it is in Mr. Ballon's handwriting.

Q Does that make any reference to your being present at the meeting?

A It does not.

THE COURT: Read the pertinent entry for that meeting.

THE WITNESS: "Conference with Joseph Radom and Sol Eisenrod and Irving Ruggendorf. Two hours. Conference with Joseph Radom, one hour."

Q There is nothing in Plaintiffs' Exhibit 12 for identification which lists any names of who in your firm were present at any of these meetings, does it?

A No, it does not.

Q There is nothing in these entries which we have just been referring to that lists more than one name, except the person whose handwriting it's in?

A There is no listing of any name of anyone in our firm.

Q Except that the handwriting indicates who did the work and whose time is entered?

A No, sir. The handwriting indicates who made the entry.

MR. SCHWARTZ: I will ask your Honor to recall the deposition before trial.

THE WITNESS: Pardon? Did you ask me a question, sir?

MR. SCHWARTZ: I made a statement to the Court.

THE COURT: I will remember it.

Q I show you this letter which has been marked Plaintiffs' Exhibit 7, January 21, 1970. Do you recall that letter sent off by Mr. Ballon?

A Do I recall it?

Q Yes.

A No, I don't recall it.

Q Have you read that at any time?

A I may have. I don't recall reading it.

Q Let me show you a photocopy of the original. Is that Mr. Ballon's signature on it?

A Yes, it appears to be.

Q At the time this letter written, had any plan been formulated for an arrangement? I direct your attention to the second paragraph.

A I don't know what you mean formulated. What do you mean by formulated? Had one been filed with the Court?

Q Do you know what Mr. Ballon meant by the phrase "Nevertheless, we were confronted with the problem of formulating a plan and arranging for the financing thereof"?

A Do I know what he meant?

Q Yes.

Q I can only interpret it my own way. I don't know what he meant. He wrote the letter.

Q What do you think that means, he meant by that?

A I assume that we were directed to have a plan filed by the bankruptcy court.

Q Do you also assume from the language that the plan hadn't been prepared at that time?

A I can, yes, I can draw that assumption reasonably.

Q And that thepoint of the letter was to get Mr. Radom to discuss the formulating of a plan?

A That seems to be the logical assumption to reach.

Q The only plan that was ever formulated to the bankruptcy court was a plan dated April 15, 1970, which has been marked in evidence here as -- I think it is H, but I amnot sure.

MR. VOGEL: Plaintiffs' Exhibit 2 for identification.

Q Plaintiffs' Exhibit 2 for identification.

Q Are you familiar with that document?

A The plan?

Q Yes.

A Yes, I am.

Q This document is a very general one, isn't it?

A I have no idea what you mean by that, Mr. Schwartz.

Q Does it give any figures of any kind as to settlement with the government claim, the amount of administration expenses, the amount of general creditors, or state anything specifically other than the fact that general creditors would receive 12-1/2 percent?

A The plan never does.

Q What?

A A plan never does.

Q Was the plan still in the state of negotiation as to details at that time on April 17th?

A I don't know. I don't remember. I believe this is the final plan. I think this is the plan that was filed.

Q Do we know when it was filed?

A I don't know off the top -- offhand, no.

Q Do you have any records in court that would establish the date?

A Do I?

Q Yes.

A No.

Q Or your counsel?

A Ask my counsel.

MR. KNIGIN: What?

MR. SCHWARTZ: The date the plan was filed.

MR. KNIGIN: I don't have it.

Q Do you know whether it ever was filed?

A Oh, yes.

Q At the time that was filed were the creditors acceptances filed with it?

A No, creditors' acceptances were not even solicited until after the plan was filed.

You see, there would be nothing to accept until the plan was filed.

Q Do you have a copy of the docket entries in the bankruptcy proceeding?

A Do I have one?

Q Yes.

A No.

Q Do you keep a docket in the office of the filing of court papers on the matters that you handle?

A They would be kept similar to the other yellow

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sheets that were already put in as an exhibit for identification -- or marked for identification.

Q Is there any entry in any of the yellow sheets of the filing of this plan?

A I don't know. I can't tell you without going through the yellow sheets for this exhibit.

Do you want me to go through all of this?

Q I would like you to see if you can establish the date that that claim was filed, if it ever was filed.

A I would be much quicker for one of us to go up to the second floor and look at the docket.

THE COURT: Just what I was thinking.

MR. SCHWARTZ: Why don't we suspend that for the moment.

Will you try to ascertain that date between now and the next hearing?

A I was hoping not to appear again, but we will try to do that.

Q I didn't mean that you had to. Somebody should let us know when that was filed. I don't think you have to come back.

A I can testify unequivally that it was filed.

Q Now, I understand that it is your contention, as it was Mr. Ballon's, that the pension fund was obligated to pay your fees whether or not the plan was confirmed?

A Yes.

Q Do you have anything to reflect that?

A In writing from the fund?

Q Yes, from the fund.

A No.

Q Did Mr. Ballon attend any of the bankruptcy proceedings?

A Yes.

Q How many?

A Very few.

Q And those were in the beginning?

A Yes.

Q I assume that you attended most of the proceedings?

A I attended substantially all of them.

Q Did you attend the bankruptcy proceeding on February 1, 1972?

A I don't recall.

Q I show you the transcript. Can you identify this?

A Yes. I was present.

MR. SCHWARTZ: May we have this marked for identification?

THE COURT: Surely.

xx (Defendants' Exhibit J was marked for identification.)

MR. SCHWARTZ: Let the record show that we have skipped Exhibit H and we will just leave it out of the case.

Q This was one of the last sessions during the course of the Chapter XI proceeding, was it not?

A Say it again, sir.

Q The proceeding of 2-1-72?

A It was toward the end of the proceeding.

Q And actually Neisco was adjudicated the following month on March 22nd?

A That is correct.

Q Do you recall this -- withdrawn. At that meeting there was a great discussion about Ernest Horvath's employment contract by Neisco?

A I don't recall.

Q You don't recall?

A I don't recall what happened on that day.

Q Do you recall any meeting at which there was a discussion of Ernest Horvath's proposed consulting agreement?

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A No, I don't recall it, not independently.

Q Do you recall this exchange between you and the referee: Page 9. I am sorry I don't have another copy of this, your Honor.

THE COURT: All right.

MR. SCHWARTZ: Line 19. "THE REFEREE: Look, Mr. Itzler, I have already commented a few times this morning -- don't let me comment about the role you played.

"MR. ITZLER: I am trying to do a job representing a company. I am not interested in Ernest or Goerge Horvath or the fund.

"THE REFEREE: I told you the last time we are placing too much emphasis on Ernest HorvatHs future, that doesn't concern me, not a bit.

"MR. ITZLER: I represent Neisco. If I am paid, I will be paid by Neisco."

Do you recall that testimony and exchange?

A If that's in the record, I assume the record is correct.

Q Did that recall to your mind that at that meeting the Horvaths had refused to go ahead or approve any plan or be part of it unless Ernest received a consulting contract under which he would receive a salary for life, and his wife would receive a pension after his death for five years, and that the fund would guarantee the payments up to a certain amount?

A I have absolutely no recollection of what you just stated.

THE COURT: The learned referee, apparently, was of the view, and expressed it, that too much attention was being paid to the future of Ernest Horvath in these proceedings.

Do you have any recollection now as to what he may have meant by that?

THE WITNESS: Well, I know that the United States of America brought a proceeding to terminate the employment of the Horvaths at one time during this Chapter XI proceeding, and he may well have been referring to that. I have no independent recollection of ever pursuing Ernest's employment before the bankrutpcy court.

Q Do you recall this exchange with the referee on page 18:

"THE REFEREE: I don't have any basis for continuing negotiations so long as you have represented, Mr. Itzler, that a condition of confirmation here is satisfying Ernest Horvath. And apparently the parties ca't come to an agreement what he will get via his brother. I have no alternative, I think that is very short sighted on your brother's part and yourself.

"MR. HORVATH: I think that your Honor wouldn't want me to go into all the ramifications at this point.

"THE REFEREE: You wouldn't want me to go into a few.

"MR. ITZLER: Your Honor, I have been successful on one or two occasions before to bring the parties closer together merely as intermediary.

"THE REFEREE: You have fifteen minutes to do it rightnow. This application will not go past today unless I am sure I am going to confirm.

"MR. ITZLER: I agreed to speak with both sides."

Do you recall that?

A I recall it very clearly.

Q Was it true at that time that confirmation of any plan was contingent upon the satisfactory employment agreement being made with Ernest Horvath?

A No. That is not the fact.

Q Isn't that what the referee stated?

A It may well have been. But that was not the fact.

Q Did you state to the referee at that hearing that it was not the fact that, a plan could be promulgated without Ernest?

A That is correct.

Q Do you recall where that was stated in this record? I will give you the transcript.

A Pardon?

Q Do you recall whether that was stated by you?

A Where was was stated?

Q That plan could be confirmed and proceeded with without regard to Ernest Horvath getting the contract?

A No, the contrary was stated. The Judge or I made a statement to the contrary. That it could not be confirmed --

Q That it could not be confirmed --

A That is correct. At that point in the proceeding, you see, the fund had already withdrawn and the ground rules were now different. This was long after September the 21st when the fund -- I am sorry, September the 2nd when the fund had withdrawn because of the indictment. The ground rules were now different. I had to work with different sets of facts in order to make this thing go, which was my function, to confirm Neisco. At that juncture I had to bring the fund and the Horvaths closer together, and I was acting, if you will, as an intermediary or mediator. The facts at that time were completely different than the facts as they existed up until September 2, 1971. The fund first repudiated its agreements at that date.

Q Did you at this meeting, after you had told the Court that if you would be paid, you would be paid by Neisco, that you had a contract with the fund under which you would be paid willy-nilly?

A The import of that statement, sir, was that I was employed by Neisco and not by the Horvaths. I didn't represent the Horvaths, had no interest in the Horvaths per se unless what happened to them affected the future of Neisco. That was the import of that statement in context.

Q Can you answer the question I put to you. I will ask the reporter to read it back.

(Read.)

THE WITNESS: I am sorry, I don't understand the question. Will you rephrase it, please.

Q I didn't hear you.

A I don't know it means to be paid willy-nilly. I am not sure what that means.

THE COURT: Regardless of outcome.

Q Regardless of outcome, exactly.

A Was it my understanding that we would be oaud regardless of outcome? Yes, it was.

Q Did you so inform the court at that meeting?

A I don't recall. I don't recall whether I ever informed the Court I would be paid willy-nilly.

Q Will you accept my statement that you didn't inform him at this particular meeting, sir?

A Yes, sir, I will.

Q Do you recall that exchange, Mr. Itzler, page 52:

"THE REFEREE: I have another problem with that that I want to resolve. What are we going to do about administration expenses, fees and allowances?

"MR. ITZLER: I would like an opportunity to discuss that problem with representative of the fund. In the event we cannot afford -- you are talking now of attorney's fees?

THE REFEREE: I am talking generally, the expenses of administration, be they creditor committee, attorneys, accountants, all of that.

"MR. ITZLER: I mentioned it to Mr. Radom before. We have not discussed it at length. I would like to attempt to have the pension fund pay these expenses as an outside party. If we can't agree on it first we will then make application to the Court for the granting of allowances. I am sure the creditors committee will do likewise.

"THE REFEREE: Mr. Radom.

"MR. RADOM: There is nothing to be gained with respect to speaking about any conversations for allowances, whatever the Court likes --" then the referee went on to a long discussion of the Brigatine Hotel case which I won't bother with. It is not relevant.

Did you at that time, Mr. Itzler, tell the referee that you had a contract with the fund under which they were obligated to pay the administration expenses?

A Not at that time, no.

Q Do you recall later on in that hearing, again, the referee stated to you on page 55, "Do you want to file acceptances with the clerk?

"MR. ITZLER: Yes, sir.

"THE REFEREE: File them tomorrow. I can adjourn the matter. I can't close the first meeting today, in any event."

A Do I recall that?

Q Yes.

A Yes.

Q Did you file the acceptances?

A Yes.

Q When?

A I don't recall that.

Q Were the acceptances audited?

A What does that mean?

A Were they checked out by the Court as to the validity of the claims?

A Yes.

Q Allowances, and so on?

A No, not as to the valdity of the claims.

MR. SCHWARTZ: I th-nk this might be a good point to adjourn.

THE COURT: All right, Mr. Schwartz. I am sorry we didn't reac you this week, Mr. Radom, but we will have to see you on Monday.

Off the record.

(Discussion off the record.)

THE COURT: We will adjourn this case until 10 o'clock Monday monring.

(Adjourned to Monday, September 27,1976, at 10:00 a.m.)

J. Haight

bs:mg 1

Ballon, Stoll & Itzler

v. 72 Civil 2916

Thomas J. Duffey, et al.

September 27, 1976

(Trial resumed)

RONALD ITZLER, resumed:

THE COURT: Proceed, Mr. Schwartz.

CROSS-EXAMINATION (continued)

BY MR. SCHWARTZ:

Q We had some discussion on Thursday about the government tax claim, and the basis for settling that.

I show you a letter from Regional Counsel and a stipulation attached, and ask you whether you have seen copies of these papers previously.

A I saw a stipulation, but I have no recollection independently as to whether this is the document I saw.

MR. SCHWARTZ: May we have this marked for identification, your Honor?

xx (Defendant's Exhibit K marked for identification)

Q Will you look at the secondpage of Exhibit K for identification and see if that will refresh your recollection as to the amount of down payment to be made on confirmation, in accordance with this proposed agreement?

A It does not.

Q Does the statement in Paragraph 1, $100,000 --

MR. KNIGIN: Your Honor, I'm going to object to any reading of this paper in the record until --

MR. SCHWARTZ: I offer it in evidence, if your Honor please.

THE COURT: Is there an objection?

MR. KNIGIN: I don't know, your Honor. I have not seen it.

THE COURT: Take a look at it.

(Pause)

MR. KNIGIN: Your Honor, this Exhibit K for identification, which is 18 pages of agreement, attached to a letter purportedly from the IRS, is a document, firstly, that is not signed so I don't know what force it has as far as its accuracy as to ever being entered into.

There is no statement in the letter that indicates that it was yet signed. It was still in the executory stage.

The other problem I have with it, your Honor, it is a letter apparently from the Assistant Regional Counsel of the IRS to Schaeffer, Dale & Vogel. No copies to our office. And according to Mr. Itzler, he apparently has never seen this document before.

Consequently, your Honor, I don't know how I can agree to its submission in evidence, not knowing the source from whence it comes.

It would seem to me that a more competent witness might be utilized for its offering.

THE COURT: You say you are seeing that document for the first time, Mr. Knigin?

MR. KNIGIN: I am, your Honor. And I think Mr. Itzler is from his statement.

MR. SCHWARTZ: Mr. Itzler should speak for himself.

MR. KNIGIN: Mr. Itzler said he didn't know what the document was.

THE COURT: Do you recall having seen that document before, Mr. Itzler?

THE WITNESS: I don't recall whether I saw that one. I have seen copies of proposed stipulations from the government, and I even think I saw a final stipulation, but I don't know whether I ever saw that one. I know there were a number of proposals and counterproposals made during the Chapter XI proceeding.

THE COURT: To which firm is the letter addressed?

MR. KNIGIN: Schaeffer, Dale & Vogel.

THE COURT: Whom did they represent at the time?

MR. KNIGIN: They represented the pension fund, your Honor.

Being that it was to the attention of Mr. Laurence Vogel, perhaps he would be a more competent witness to have this admitted into evidence. He is present, your Honor.

THE COURT: I understand.

MR. SCHWARTZ: I am really quite surprised, your Honor, that counsel is seeking $100,000 for legal services and does not remember one of the most important obstacles to confirming the plan of arrangement, which was the government claim.

For Mr. Itzler to say he does not remember this specific document is --

THE COURT: That may be so, Mr. Schwartz, but this witness does not identify the document. There is no stipulation pursuant to which I can admit it, and I do not think it is provable through this witness.

So I will not accept the offer at this time.

It follows from that that it cannot be read from.

BY MR. SCHWARTZ:

Q Is there any question in your mind, Mr. Itzler, that the final terms of the settlement of the government claim was the down payment of $100,000 and the guarantee by the fund of an additional amount equivalent to half the claim?

A Yes, there is a question. I don't know.

Q What is your concept of what the final terms of that proposed agreement were?

A I don't recall because it was the fund that worked it out. I had very little to do with it.

Q At the last session you were asked about when the proposed plan, Plaintiff's Exhibit 2 for identification, was filed.

I direct your attention to the minutes of the bankruptcy hearing of April 16, 1970, at page 142, line 9, and ask you to read that and see if that refreshes your recollection as to when it was filed.

(Pause)

A The minutes tell me that it was filed on the date of this hearing.

Q That was April 16, 1970?

A That is correct, sir.

MR. SCHWARTZ: If your Honor please, there are quite a few excerpts from the bankruptcy hearings that we would like to offer, and I would not like to burden your Honor with taking the time of the Court now to do it, but I would like to suggest that all of the bankruptcy minutes be deemed in evidence and we will, at the conclusion of the trial, submit to your Honor excerpts, marking the pages that we think are of consequence in this case.

Of course,we will give you actual copies of the pages so that you will have reference to the dates of the hearing and the page and line number.

THE COURT: Mr. Knigin?

MR. KNIGIN: Your Honor, it is the intention of the plaintiff, as part of the prima facie case, to read into the record portions of the bankruptcy proceeding minutes.

I just want your Honor to understand that if Mr. Schwartz wants to adopt this procedure, it would not be acceptable to us, and with your Honor's permission, we would like to proceed in the manner in which we had originally intended.

THE COURT: Do you propose to read in long portions of the minutes?

MR. KNIGIN: No, your Honor, there are very, very short portions, but there are several.

MR. SCHWARTZ: There is no objection to that. At the same time, I'd like to have it available so that we can submit it without reading it in at this time.

THE COURT: I will agree to both proposals.

MR. KNIGIN: Thank you, your Honor.

MR. SCHWARTZ: Thank you.

Q There was considerable testimony last week about Mr. Rugendorf's status in relation to the pension fund, as to whether he was an employee or an independent contractor.

Do you recall that?

A Yes, I do.

Q Do you recall that you cross-examined Mr. Rugendorf at length at the hearing at September 17, 1970, regarding his status?

A No, I do not recall that.

Q I show you a transcript of the hearing in the Neisco Chapter XI proceeding on September 17, 1970, page 135, and I ask you whether that is the cross-examination by you of Mr. Rugendorf with regard to his relationship to the fund?

A It appears that there was some examination of Mr. Rugendorf by myself. I don't recall what the context of it was.

Q Thank you.

MR. SCHWARTZ: As I understand this is deemed in evidence; we will submit to your Honor the relevant portions.

THE COURT: Yes. That procedure is acceptable.

MR. SCHWARTZ: I offer in evidence a letter dated February 3, 1970, signed by Frederick E. M. Ballon, addressed to Joseph Radom, which was furnished to me by the plaintiffs as part of Exhibit I on their deposition--the deposition of Mr. Itzler before trial.

MR. KNIGIN: Your Honor, I am very sorry that it wasn't offered when Mr. Ballon was here because apparently it was a letter from him, but Mr. Schwartz has represented to me that this is a Xerox of a letter that he took from our file.

I will accept his representation to that effect. It is unfortunate, because I think that this is a letter that will require Mr. Ballon to be present and should be testified to, but I can't do anything about it except say, your Honor, that I think it is the wrong time to offer it, but I realize that this is a continuing trial, so other than that, I take Mr. Schwartz' representation and will not object.

THE COURT: The timing is a little odd, Mr. Schwartz. We are still dealing with the plaintiff's case and this is cross0examination of this witness and all of a sudden you pop up and offer a defense exhibit.

MR. SCHWARTZ: Actually I am finished with this witness and I'm trying to clean up a few loose ends.

Actually this letter was testified to by Mr. Ballon because when I questioned him about a letter that he got from Joseph Radom February 18th, in response to this, there was a lot of questioning about it.

I want this in the record to sort of tie up the testimony on the other letter.

THE COURT: I will receive it.

xx (Defendant's Exhibit L marked for identification and received in evidence)

MR. SCHWARTZ: For the record, your Honor, the other letter that I just mentioned, the February 18th letter, is Defendant's Exhibit G.

That will be all from this witness, your Honor.

THE COURT: Redirect, Mr. Knigin?

MR. KNIGIN: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. KNIGIN:

Q Mr.Itzler, during the course of the testimony there seemed to have been some question, and you were directed to page 26 of your examination before trial, in relation to how the fund would pay the fee.

As far as you know, Mr. Itzler, from the time that you became involved in this case, was there any question as to how it would be paid?

A The method?

Q Well, firstly, who would provide the funds?

A There was never any question with respect to who would provide the funds.

Q Was there any question about whether there would be a successful conclusion to the XI or an unsuccessful conclusion to the XI?

A That was never discussed.

Q Was there any question as to the method by which the moneys would flow from whoever was to pay it to whoever was to receive it?

A Oh, yes.

Q Who was to pay it?

A The pension fund.

Q Who was to receive it?

A Our firm, as well as creditors, and other professionals to whom allowances would be paid.

Q What were the alternative methods, if any, discussed as to how that route would take place?

MR. SCHWARTZ: By whom and when, if your Honor please?

Q Could you tell us?

A Well, the discussions took place at most of the meetings about which I testified last week. Those are the discussions that were held in my presence. There may have been discussions at times when I was not present.

Q You don't know what happened when you were not present?

A No, sir.

Q When you were present, what happened?

A The discussions basically centered around who would pay it and who would receive it, and very little was discussed with respect to the manner in which it would be paid.

Q When you filed the bankruptcy schedules, and talked about the $25,000 coming from Montmartre, at that point in time had you attended any meetings?

A Yes, I believe I did attend one meeting.

Q How many?

A I believe one.

Q Other than that one meeting which you attended, all these discussions about the alternative methods, who handled them in the firm?

A Mr. Ballon.

Q And if you had any information other than was arrived at from the meetings, where did you get it from?

A From Mr. Ballon.

Q When you drew this document, that is, the schedules of the bankruptcy petition, were you relying on what you had seen and heard at the one meeting?

A I was relying on what I had seen and heard at that meeting and what I had discussed with Mr. Ballon.

Q I want to ask you about this tax claim.

When you first heard about the tax liability of Neisco, did you hear it in one of these discussions at which members of the fund were present?

A I don't think so, no.

Q Did there ever come a time when it was discussed in front of the fund members?

A Oh, yes.

Q Was that within a couple of months of the filing of the petition?

A Certainly.

Q What did you know at that time to be the tax claim?

A Approxiamtely $450,000.

Q Do you know what the tax claim ultimately was reassessed at by the government?

A I don't think I do know. I don't recall it right now.

Q If I were to tell you a figure of $1,300,000, would that serve to refresh your recollection?

A It certainly would.

Q So it wasn't the original $450,000, is that correct?

A That is correct.

Q How did you come to know the tax claim to be $450,000?

A I believe I received that information from the financial people at Neisco when I was trying to elicit the information necessary to prepare the schedules and file the petition.

Q During all the time that the conversations were going on with the fund people, what amount of money were all of you discussing together?

A $450,000.

Q Did there come a point in time when you found out it was something different?

A Yes.

Q When you found that out, whose responsibility was it, or who took the responsibility to resolve that claim?

A Representatives of the pension fund.

Q Did you have any function at all in that regard?

A No, not really.

Q Did anybody at Ballon, Stoll & Itzler have any function in that regard?

A Not to my knowledge.

Q For how long a period of time did the representatives of the fund work on this deal?

A A great period of time; perhaps a year.

Q During all that period of time where was Ballon, Stoll & Itzler in relation to the IRS claim?

A We did very little.

Q Do you know who did it most on behalf of the fund?

A Mr. Vogel and Mr. Radom.

MR. KNIGIN: No further questions.

MR. SCHWARTZ: No recross.

THE COURT: Mr. Itzler, let me ask you a couple of things.

When you were testifying last week there was a good deal of discussion about other bankruptcy cases which your firm has been involved in and fee arrangements that were made in connection with those cases.

What I want to know is whether your firm has ever had an arrangement which-- or participated in a case which is on all fours with this one, and by that I mean, have you ever had any other case where (a) a lien creditor was funding the arrangement; (b) your firm acted as attorney for the debtor in possession, and (c) your firm had an agreement with the lien creditor entered into prior to your appointment as counsel for the debtor in possession as to what the amount of your fee as counsel for the debtor in possession would be.

Can you think of any other situations?

THE WITNESS: If I recall properly, your Honor, and you will have to forgive me because it is some time ago, but I believe that the Abbe Rabiner situation was, if not on all fours, quite comparable to this one.

THE COURT: Is it --

THE WITNESS: I might add, I have not checked the Abbe Rabiner file since it was closed so I'm trying to recall from my own knowledge without any refreshing of my recollection.

THE COURT: But it is your testimony, as I understand it, that within the bankruptcy context such a prior agreement with the lien creditor who was funding the arrangement would not constitute a "connection" as that word is used in your affidavit, is that right?

THE WITNESS: That is my belief and was my belief at the time I drew that affidavit.

THE COURT: Tell me, if what we have just been talking about is not a connection, within the bankruptcy context, give me some examples of what connections would be in this context.

THE WITNESS: If our firm had at one time or another represented someone involved in the matter, we would be -- we would have a connection with that person, even though our interest at the particular time was not an adverse interest.

I suppose if someone at a creditor firm had once worked for Ballon, Stoll & Itzler -- that has happened on occasion -- there would be a connection.

If there were pending litigation, either probably against a creditor -- I suppose that would be a connection.

If there were agreements existing between Ballon, Stoll & Itzler and an outside third party, or a creditor, I suppose that would be a connection.

I imagine there are any -- almost any prior relationship, your Honor, may be a connection.

THE COURT: Any prior relationship, including agreements?

THE WITNESS: Pardon?

THE COURT: Including some sort of agreement?

THE WITNESS: You are most incisive.

THE COURT: I am inquisitive.

THE WITNESS: Yes.

THE COURT: But not this agreement?

THE WITNESS: No. This agreement was not an agreement per se between Ballon, Stoll & Itzler and the pension fund, but an agreement in which Ballon, Stoll & Itzler was a beneficiary.

THE COURT: That's all I have.

RECROSS-EXAMINATION

BY MR. SCHWARTZ:

Q In the amended complaint, Mr. Itzler, you don't plead any third party beneficiary cause of action, do you?

MR. KNIGIN: Your Honor, the amended complaint speaks for itself.

THE COURT: Yes. I will consider what it says and does not say, Mr. Schwartz.

Q If the plaintiff is not a direct beneficiary of an agreement with the fund, can you tell us who made the direct agreement with the fund?

A I didn't say that there was any other party.

Q Are you basing this case upon an agreement with the fund made by someone?

A I have no idea. You will have to speak with my counsel with respect to that.

Q Did you read the complaint in this case?

A Yes.

Q Did you approve it before it was filed?

A No.

Q Who prepared the complaint?

A I don't know. Someone in my office in our litigation department.

Q Did you disapprove it before it was filed?

A No.

Q It wasn't submitted to you for review since you handle most of the court proceedings?

A No, it was not.

MR. SCHWARTZ: Thank you.

MR. KNIGIN: Your Honor, I don't mean to burden the record, but I just realized that there were four documents that I wanted to introduce through this witness.

I realize that I should have done it on direct, and I'm sorry. But may I do that just now?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. KNIGIN:

Q Mr.Itzler, I show you this correspondence from Mr. Joseph Radom, dated November 28, 1969, and ask you whether or not you received that correspondence from Mr. Radom with the attachment that is attached to it?

A Yes, I did.

Q I show you this document, dated August 18, 1971, from the firm of Schwartz, Cooper & Kolb, of the American National Bank & Trust Company of Chicago, in reference to a loan to Neisco, and ask you whether or not you received this document.

A Yes, I did.

Q By the way, do you note on the bottom whether or not a copy of that was sent to Mr. Vogel?

A It appears that it was.

Q I show you this document dated August 25, 1971 and ask you whether or not that represents a response to that letter.

A It does.

MR. KNIGIN: Your Honor, I offer these in evidence.

MR. SCHWARTZ: There is no objection to the letter of November 28, 1969.

THE COURT: Received.

xx (Plaintiff's Exhibit 18 marked for identification and received in evidence)

MR. SCHWARTZ: There is no objection to the letter of August 18, 1971 by Schwartz, Cooper & Kolb, to Ballon, Stoll & Itzler.

THE COURT: Received.

xx (Plaintiff's Exhibit No. 19 marked for identification and received in evidence)

MR. SCHWARTZ: There is no objection to the letter of August 25 by the witness to Schwartz, Cooper & Kolb.

THE COURT: Received.

xx (Plaintiff's Exhibit 20 marked for identification and received in evidence)

THE COURT: Please proceed.

Q Now, Mr. Itzler, are you familiar with the file of Ballon, Stoll & Itzler v. Duffey?

A Yes.

Q Has that file been part of the files of Ballon, Stoll & Itzler since the inception of this case?

A They have.

Q Have they been maintained at that office?

A They have.

Q I show you this document and ask you if you can recognize that to be a letter that was included in the file of Ballon, Stoll & Itzler and has been maintained as a record in the ordinary course of business by that office?

A Yes, it has.

I have seen this letter on numerous occasions.

MR. KNIGIN: May I have this marked for identification, please.

xx (Plaintiff's Exhibit 21 marked for identification)

MR. KNIGIN: I offer it in evidence.

MR. SCHWARTZ: No objection.

THE COURT: Received.

xx (Plaintiff's Exhibit 21 received in evidence)

MR. KNIGIN: Your Honor, at this time I would like to remind the Court that earlier in the proceeding Mr. Schwartz produced a letter which there was some question about whether or not we could find a copy of it in our file.

You had asked me if I would make a search.

That letter, by the way, your Honor, just so that the record will indicate it, was Exhibit C, Defendant's Exhibit C.

We have made such a search, your Honor, and have found that there is such a letter, and your Honor also asked if we could find a response to that letter, at Mr. Schwartz' request, and we have made the search and we have found the response to that letter.

I will, if your Honor will permit, as long as the February 24th letter is already in evidence, and in accordance with your direction, we would offer the April 1, 1970 response to that letter in evidence.

THE COURT: Show it to Mr. Schwartz, please.

MR. SCHWARTZ: May I ask counsel where this letter was reposing in the office of Ballon, Stoll & Itzler?

MR. KNIGIN: It was reposing here in the courthouse. We had it in our file that was already in evidence, that was marked into evidence.

MR. SCHWARTZ: I must state for the record that it was not in the group of letters which were furnished to me on the deposition of Mr. Itzler before trial. I'm sorry. It is out of order.

MR. KNIGIN: I think Mr. Schwartz was just in error, that it was part of his file.

MR. SCHWARTZ: In any case, there is no objection to this.

THE COURT: It may be received.

xx (Plaintiff's Exhibit 22 received in evidence)

MR. KNIGIN: No further questions.

THE COURT: The witness is discharged.

THE WITNESS: Your Honor, I would like to clarify an answer that I gave to your last question.

THE COURT: Surely.

THE WITNESS: With respect to the agreement and who the parties to the agreement were, I think I ought to emphasize that I was not present in Chicago at the time the agreement was made. I was merely present at the time when it was affirmed, and what was said with respect to the agreement was who would fund the plan and where the money would come from. There was never any discussion as to who the other parties to the agreement in the classical sense would be in my presence.

All that was said was that the fund would fund or make available funds necessary for the confirmation of the agreement.

THE COURT: All right.

MR. SCHWARTZ: Let me ask him one or two questions about these letters.

RECROSS-EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Itzler, Exhibit 18 is a letter from Mr. Radom to you, to which is attached a form of certificate of indebtedness.

That certificate was issued pursuant to the order of the Bankruptcy Court, entered November 24, 1969, and then amended November 28, 1969, is that correct?

A Yes, I believe so.

Q And it was pursuant to that certificate of indebtedness and others like it under that order that the fund advanced to Neisco about $1,600,000 during the course of the reorganization proceeding?

A That is correct.

Q The letter of August 18, 1971, from the American National Bank & Trust Company,was that written on the occasion when Neisco needed some more money?

A May I see that again, if you don't mind?

Q Yes. (Handing).

A I think so, yes.

Q As a matter of fact, didn't Neisco borrow half a million dollars from the American Bank & Trust Company of Chicago under the provisions of a transaction that that letter relates to?

A If my recollection serves me correct, I think there was such a loan.

Q In order to make that loan, didn't the fund subordinate its prior loans of $1,600,000?

A I believe that was part of the transaction, too, yes.

Q And Exhibit 20, which has been offered, is your opinion letter in response to Exhibit 19 to enable the American National Bank to make that additional loan of a half a million dollars, is that correct?

A Yes, sir, it is.

Q This letter, Exhibit 21, November 19, 1973, was written to counsel for the defendants at that time while this action was pending, is that right?

A Pardon?

Q The letter, Exhibit 21, is a letter which Mr. Cohn of your firm wrote to Schaeffer, Dale, Vogel & Tavrow while this action was actually pending in court?

A Well, yes. I don't know-- it wasn't pending in court. There was an action pending.

Q Isn't it a fact that you filed the complaint in this action in either May or June of 1972?

A I can't answer that, sir.

MR. KNIGIN: We will concede it for the record, your Honor, that the letter was written while this action was pending.

Q So that at the time that this letter was written requesting the service of an amended complaint, this action had been pending about a year and a half?

A I don't know when the action was commenced. But it was pending.

Q Will you accept the fact that you and Mr. Ballon had been examined before trial before this letter was sent?

MR. KNIGIN: We will concede that it had been an extensive period of time since the action was commenced and that this letter was written during that period, yes.

Q Is there anyting in the amended complaint that this letter refers to regarding a third party beneficiary claim?

MR. KNIGIN: Your Honor, third party complaint speaks for itself, as does the letter.

THE COURT: Mr. Itzler did not use the phrase "third party beneficiary." He said the firm was a beneficiary of the agreement.

I can read the complaint myself, Mr. Schwartz.

MR. SCHWARTZ: Thank you, your Honor.

MR. KNIGIN: Is the witness excused, your Honor?

THE COURT: The witness is excused.

MR. SCHWARTZ: If your Honor please, unless the plaintiff has more live witnesses, I wonder if we might put Mr. Radom on the stand out of turn now so that he can get back to Chicago -- to Detroit. He has a court appearance tomorrow morning in Detroit.

MR. KNIGIN: Speaking of live witnesses, we have a live witness who it might serve very well to take Mr. Radom out of turn. We intend to use the live witness as a rebuttal witness, so there would be absolutely no objection by plaintiff to allow Mr. Radom to proceed at this time out of turn.

THE COURT: Very well.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

------------------------------x

BALLON, STOLL & ITZLER,

Plaintiffs,

vs. 72 CIVIL 2916

THOMAS J. DUFFEY, et al.,

Defendants.

------------------------------x

Before:

HON. CHARLES S. HAIGHT, JR.,

District Judge

September 27, 1976
10:00 a.m.

APPEARANCES

KENNETH S. KNIGIN, ESQ.,
Attorney for Plaintiffs

MESSRS. GREENBAUM, WOLFF & ERNST, ESQS.,
Attorneys for Defendants
BY: LAURENCE VOGEL, ESQ.,

of Counsel

and

SYDNEY J. SCHWARTZ, ESQ.

JOSEPH S. RADOM, called as a witness by the defendants, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Radom, what is your profession?

A I am an attorney.

Q How long have you been practicing law?

A I was admitted in 1937.

Q Do you practice in any specialized field?

A The bulk of my practice is, and always has been insolvency work.

Q That includes bankruptcies and Chapter Eleven proceedings?

A That's correct.

Q Have you represented the defendants in various matters?

A I have.

Q And what is the nature of your representation of the defendants?

A Counselling them with respect to litigation, such as the Ballon case, a case involving Ernest Horvath. I have been responsible also for drafting documents respecting loans made by the Pension Fund to borrowers, and so forth.

Q You are outside counsel, you are not house counsel or anything involved with the organization of the Pension Fund, are you?

A That's right.

Q When did you first hear about Neisco, or the Horvath companies?

A During the summer of 1969.

Q When did you first meet anyone on behalf of the Horvath's or their companies in that connection?

A George Horvath, an officer of Neisco appeared at the quarterly meeting of the trustees in Chicago during the latter part of the summer of 1969.

Q Can you tell us in substance what he said to the trustees and what action was taken, if any?

A The Neisco matter was not on the agenda for the trustees, and he requested an opportunity to be heard.

The chairman rejected his request; however, the meeting was recessed and three or four of the trustees, and myself and others, including Mr. Dorfman, adjourned to an adjacent conference room and met with Mr. George Horvath.

Mr. Horvath demanded that the Pension Fund Trustees make additional funds available to Neisco. He advised the trustees who were present at this meeting in the conference room that Neisco was devoid of any operating funds and, as I indicated, he didn't request, he demanded the trustees make additional loans available.

The response given to him was that the trustees would consider the matter following his departure and would advise him.

This matter was thereupon presented to the trustees within a matter of a few minutes after we recessed. By that time Mr. Horvath had left the premises and the request was rejected.

Q Did that meeting take place before October, 1969?

A It did.

Q Was there -- when was the next meeting you had at which George Horvath was present?

A During the forepart of November, 1969.

Q Was Mr. Ballon there also?

A Mr. Ballon was present, Mr. Jack Polish was present, both being counsel, Mr. Polish being in-house counsel for Neisco. I was present, Mr. Teitlebaum was present, some of the trustees were present, namely, Mr. Matheson, Mr. Peters, Mr. Duffey may or may not have been present -- I believe he was, Mr. Al Baron was present. He was a consultant to the firm -- a consultant to the trustees. Mr. Weisser, an accountant -- an independent accountant, was also present.

I had suggested the meeting because I had been alerted by Mr. Teitlebaum, prior to this scheduled meeting, that in speaking to Mr. Polish he had been advised that Neisco was preparing to tile a Chapter Eleven Petition.

I thereupon indicated to Mr. Teitlebaum the desirability of meeting with Mr. Polish, Neisco counsel, and perhaps Mr. Horvath, to review what could be done about rehabilitating Neisco through a Chapter proceeding and also determining what could be done to best serve the interest of the fund.

Q At that time did the fund have loans outstanding with Neisco as well as other Horvath companies?

A At that time Neisco was indebted to the Pension Fund Trustees for approximately $1,000,005 plus interest which had not been paid. This loan was made, oh, perhaps, a year prior to our meeting. No repayment was made.

In addition to that, the Masmo Company, which was an affiliate, was indebted to the Pension Fund Trustees for approximately $4,000,000.

In addition to that amount, the Montmartre, which is an affiliate of Neisco and Masmo, was indebted to the Pension Fund Trustees for an amount in excess of $6,000,000.

Q All these loans then were in default?

A All of them were in default. As a matter of fact, at that moment I do believe that foreclosure proceedings had been commenced by the trustees in Florida against the Montmartre Hotel.

Q Can you tell us what was discussed at this meeting in early November at the Pension Fund at which Mr. Ballon and Mr. Horvath were present, with respect to -- well, all the subjects covered?

A The active participants at this meeting were Mr. Ballon, Mr. Teitlebaum and myself.

Others were there and made no contribution of any kind, except Mr. Weisser who sought to elicit the financial condition of Neisco fromMr. Polish and Mr. Horvath.

THE COURT: Tell me again, sir, who Mr. Teitlebaum was?

THE WITNESS: Mr. Teitlebaum was also an attorney representing the Pension Fund Trustees, and had devoted a considerable amount of his time in the documentation of loans made by the Pension Fund Trustees to various borrowers.

He was not, contrary to what Mr. Ballon said general counsel. He was an attorney for the Pension Fund Trustees.

Q Was his area of expertise in real estate?

A Primarily.

Q Would you tell us now what conversations took place at this meeting?

A Mr. Ballon indicated that Neisco was prepared to file a Chapter Eleven proceeding and he indicated that this action would be taken rather quickly.

My inquiry was how did they intend to fund or finance the arrangement proceeding. Obviously merely filing a Chapter Eleven petition may give the debtor relief in having creditors withhold prosecuting or commencing proceedings, but it did not solve the problem which was then facing Neisco, and that was it was devoid of all funds whatsoever. The utilities in theCarolinas where these textile mills were located were threatening to turn off the power. There were 300 employees on the payroll and the company had no money with which to meet that payroll, which was upcoming.

Prior to the meeting I had discussed with some of the trustees the possibility that if Neisco was serious about filing a Chapter Eleven petition, it might be for the best interest of the fund because we had two choices open to us at this moment: a) because of the serious delinquencies we could commence foreclosure proceedings and try to retrieve the collateral. This had certain -- this had definite problems related to it, particularly since Mr. Horvath was one not to capitulate readily or voluntarily. As a matter of fact, Mr. Horvath felt he had been handled rather badly by the Pension Fund Trustees, not withstanding the amounts that he had withdrawn, he felt he had been imposed upon by the trustees, and there was a conflict or a confrontation that I thought we might best avoid if another means could be achieved.

Another alternative available to us was to indicate to Mr. Ballon and Mr. Polish, representing Neisco, that the Pension Fund would look with favor upon funding a Chapter proceeding, or at least making funds available to the Chapter -- to the debtor in possession while a plan was being devised providing that certain safeguards were established.

It was for these purposes that we had the discussion in Chicago. Nothing was said at this meeting respecting the specifics of a plan; no one knew what the liabilities were, at least, I have no recollection of anybody disclosing to us that the government was seeking

$1,300,000 or what other problems were then confronting Neisco.

We focused our attention upon the immediate problem and that was to see to it that funds were infused permitting operations to continue, because, as Mr. Ballon aptly described it, if we didn't the operations would have been ceased and we would be left with so much iron for disposition.

So we concentrated our efforts as to whether it was prudent and feasible for the trustees to do this, to finance a debtor in possession as far as its current operations were concerned, and secondly, the amount.

We didn't inquire what fees Mr. Ballon had obtained or was seeking. Mr. Ballon made no demands upon us. Compensation was not discussed. We had no idea of whether he had received a retainer, promissory notes from Montmartre or anyone else at that time.

This was a stopgap arrangement that we discussed until such time -- until such time as may elapse before the facts were assembled, a decision made whether it was prudent to rehabilitate it or whether it could be rehabilitated and whether the Pension Fund Trustees were justified in refusing anymore money beyond that necessary to carry on operations.

I might further add this, Mr. Schwartz, present at this meeting were three or four of the trustees. Mr. Ballon went to some extent in courting Mr. Matheson, who I might unequivocally state,at this time made no statements of any kind to Mr. Ballon as to what the trustees might or might not do with respect to the funding, payment of fees or otherwise. His fees didn't become a matter or subject of conversation, as I said before.

The trustees sitting in that room during the forepart of November, 1969, didn't have the authority to bind the fund. It required a meeting -- it required the consents of the majority of the sixteen trustees who serve on the Pension Fund.

Q Is the fund a common-law trust?

A It is.

Q Did the trustees consist of eight union representatives and eight industry representatives?

A I believe eight employer trustees and eight union trustees is more appropriate.

Q Is there any trustee who has any more authority than any other trustee, or are they all co-equals as trustees?

A According to the trust instrument all have equal say, but obviously in any group of this kind one has somewhat more authority -- one has more -- has the ability to prevail or have his opinion prevail over others.

Q At this meeting was there any mention by Mr. Ballon as to how much money Neisco was looking for?

A There was some suggestion made that the amount required was in excess of $1,000,000. The precise amount, I don't recall.

Q Was there any discussion at this meeting as to the amount of counsel fee of Mr. Ballon's firm?

A There was absolutely no reference made whatsoever to Mr. Ballon's fees.

Q What was the next meeting that took place at which you and Mr. Ballon were present?

A Mr. Ballon indicated that -- on the witness stand the other day that we had a meeting in Chicago within a matter of two or three weeks thereafter. We may have had. I have no independent recollection of that meeting.

I believe that the next time I saw Mr. Ballon was in his office in New York City after the petition for Chapter Eleven had been filed, although I was in Chicago repeatedly during those days and he may have been there, but I have no independent recollection of having seen him.

I might say that the meeting adjourned -- the meeting adjourned with respect to the forepart of November meeting, adjourned with the understanding that Mr.

Weisser, the accountant, was to meet with representatives of Neisco to determine just what would be required to enable the trustees to stay in operation. This was during the -- during the immediate period next succeeding the filing of the operation for relief under Chapter Eleven, this was.

Q Did there come a time when Mr. Weisser's firm had made an examination of the Neisco situation and advised the Fund that Neisco needed $1,500,000 to $1,600,000 to come out of the -- its present mores?

A Mr. Weisser made an immediate analysis and informed us, that is, myself, Mr. Teitlebaum and some of the trustees, the amount required was approximately $1,500,000 -- $1,600,000.

Q Were there meetings of the Fund and the steering committee of the trustees from time to time at which the Neisco matter was discussed?

A There was. The first time following the forepart of November meeting at which the Neisco matter was discussed was undertaken through two conference calls. As I indicated earlier, the trustees meet quarterly. During the entire screening period, if any matter requires urgent or prompt attention, it had been the practice to some extent in those days to attempt to obtain approval or ratification by written consents of the trustees or through a telephone conference.

There was a sense of urgency in obtaining trustee approval of this proposed loan of $1,600,000. Therefore, upon Mr. Teitlebaum's recommendation the secretary of the Pension Fund at that time, Mr. Murtha, arranged a conference call with several trustees, at which time the Neisco matter was discussed at length, and those trustees assented to the adoption of a resolution to the effect that the fund would make $1,600,000 available to the debtor in possession, providing that the fund had some control over the disbursements of these monies.

In other words, the trustees had absolutely no confidence whatsoever in Mr. Horvath. They wanted to make sure that if they sanctioned a further advance it would be done first under court approval and, secondly, by permitting a designee of the Pension Fund Trustees to countersign all checks during the pendency of the arrangement proceedings.

This conference call was placed and was followed by another conference call to the remaining trustees, and the requisite consents were obtained and the trustees, as a consequence, authorized making available to the debtor in possession a sum not to exceed $1,600,000, to be evidenced by a certificate of indebtedness bearing interest at the rate of nine percent per annum, and further conditioned upon the fact that such certificate would have absolute priority over all expenses of administration, except the referee's salary and expense fund, and the third condition being that the trustees would have the power to countersign all checks, through its designee.

Q I show you the document, Exhibit A, which is part of Defendants' Exhibit F, and I ask you whether that is a minute of the conference calls held on November 21, 1969, and whether those are the calls that you have just summarized?

A This exhibit does summarize two conference calls which were placed and held on November 21, 1969.

Q Are these minutes, and this summary, part of the minutes of the trustees kept in the regular course of the operation of the Pension Fund?

A I assume as much. I do not have anything to do with it physically, or it was not my responsibility.

Q What is that?

A I assume as much, but it was not my responsibility.

Q Do you recall when the next time was that you met Mr. Ballon, the date, in New York?

A The forepart of January, 1970.

Q Can you tell us where that took place; who was present, what discussion took place at that meeting?

A It occurred in Mr. Ballon's office. Present were Mr. Melman, certainly, Mr. Matheson, a trustee -- Mr. Melman is an attorney with whom I was then associated -- Mr. Itzler may or may not have been present, I don't recall.

The purpose of the meeting was to develop an understanding as to what might be done in formulating a plan of arrangement for the benefit of the unsecured creditors.

It was at that time I was -- I learned at that time, though it might have been shortly before that, that the tax liability to the United States for unpaid withholding taxes, social security taxes, was in excess of $1,300,000.

There were a number of problems which were then confronting us because in our approach, we were not interested in resolving one item and having protracted litigation with Mr. Horvath in another half dozen or more arenas, so it was also understood among the parties, including Mr. Ballon, Mr. Itzler and Mr. Polish, that whatever we did, we had to accomplish a resolution of the differences then existing between the Horvaths and the Pension Fund Trustees.

We had the Montmartre situation in Florida. We were asked to discontinue that foreclosure action, which we did.

Arrangements were made to have a countersignature on that account in Florida. And this required a series of meetings to accomplish.

There was a matter of the offices in New York City, who was to absorb the cost of that. The sums then being paid to Mr. Horvath, that is, George Horvath, by Neisco, $52,000 a year, in my judgement, was for completely nothing.

Ernest Horvath, his brother, was also receiving money. During the course of that meeting and other meetings subjects of this kind constantly came up. As you will note from the correspondence introduced earlier, Mr. Ballon recognized that all matters had to be resolved, and he presented these suggestions to me, or proposals to me, in the hope that they might be formulated into a final overall settlement.

The language that he employs throughout his letters in correspondence to me --

MR. KNIGIN: Your Honor, at this time I'm going to object. I have allowed him to continue without making a request to the Court. The witness has said, "Mr.

Ballon knew. We always felt." Now he's talking about the tenor of his correspondence.

I think that the correspondence, first of all, speaks for itself. I think it would be more appropriate for the witness to tell us, as his own counsel has insisted throughout the plaintiffs' case, who said what to whom and not what he thinks somebody knew.

I therefore, submit, your Honor, that this portion of his testimony be stricken and that he be directed to merely state what he said and what he said and what someone else said, and tell us when it was said.

THE COURT: Yes, the objection is well taken. I was waiting for it, Mr. Knigin. I will sustain the objection.

We will take a five minute break now.

Let me ask you this, Mr. Radom, I gather that you recall only one meeting out in Chicago between yourself and the representatives of Neisco, including Mr. Ballon; is that correct?

THE WITNESS: During that period of time, yes. Mr. Polish came there subsequently, but we are talking of the time frame between November and December, 1969, I have no independent recollection of a second meeting. I am not indicating that Mr. Ballon's recollection is erroneous, he may be right.

(Recess)

(Open court)

JOSEPH S. RADOM, having been previously sworn, resumed the stand and testified as follows:

DIRECT EXAMINATION CONTINUED

BY MR. SCHWARTZ:

Q Mr. Radom, could you diagram for us the various Horvath corporations and their interrelation between each other so we have some concept of this corporate structure?

A Yes. I think I have gone about as far as I need for our purposes. Masmo was wholly owned by the Horvaths. Mt. Clemens Corporation was an affiliate of Masmo, seventy-eight percent owned by Masmo and twenty-two percent owned by the public. Mt. Clemens Corporation in turn owned all the capital stock of Mt. Clemens Industry, and Mt. Clemens industries owned all the stock of Neisco and Craftspun. Owned by Craftspun were three different corporations; one corporation owned a portion of Montmartre, and a second corporation owned the leasehold interest and a third corporation was the operating company, which held the leasehold interest.

Q In your recollection of a meeting that took place in January of 1970 -- I don't recall whether we exhausted the subject matter of the conversation that took place there.

Was there any discussion specifically of the question of fees by Ballon and Itzler ?

A The first time that I had any conversation with anyone representing the Ballon firm with respect to fees occurred in August, 1971. Nothing was said about compensation in Neisco prior to that time. There was a request made with respect to Masmo, but nothing with respect to Neisco until August, or thereabouts, 1971.

Q Was a request with respect to Masmo contained in a letter of February 3rd, 1970, addressed to you by Mr. Radom, which has been marked Exhibit L in this case?

A I think you misspoke yourself. You mean Mr. Ballon. Mr. Ballon sent me the letter.

Q Mr. Ballon, yes.

A That's right.

Q Was your response to that request contained in the letter which has been marked Defendants' Exhibit G, February 18, 1970?

A It was.

Q When was the next meeting that you had with Mr. Ballon after the January meeting?

A I had a series of meetings with Mr. Ballon, and Mr. Itzler during the late winter and spring of 1970, more or less relating to identical problems.

We were attempting throughout these meetings to develop an approach or, to use Mr. Ballon's expression, a vehicle to resolve all problems between the Pension Fund Trustees and the Horvaths, and these were all interrelated; one could not be resolved without the other. If one failed the whole situation collapsed.

This was made abundantly clear to me by Mr. Ballon and also by Mr. Polish, and it is reflected in all the correspondence which I exchanged with Mr. Ballon.

Q I show you Plaintiffs' Exhibit 5, a letter dated April 8, 1970, and ask you whether you recall receiving that letter?

A I do.

Q Did that follow a meeting with Mr. Ballon in New York?

A Sir?

Q Did that follow a meeting with Mr. Ballon in New York?

A Yes, it did.

Q Does that letter list the various topics that were under discussion and in controversy at that time?

A That's right.

Q Are those --

THE COURT: Which exhibit is this, Mr. Schwartz?

MR. SCHWARTZ: Exhibit 5.

Q Was there any consensus arrived at with respect to those matters or any of them at the meeting -- at which the discussion took place?

MR. KNIGIN: Objection to the form "any consensus arrived at" If he wants to testify as to what his understanding was, I have no objection, your Honor. If he wants to testify to what was said I have no objection, but I don't know what a consensus means.

THE COURT: I think it is better if you pursue it according to the witness' understanding.

Q According to your understanding, was there any consensus arrived at at that meeting which is reflected in the letter of --

THE COURT: That doesn't cure it. You may ask the witness what his understanding was of what was agreed.

Q Will you give us your understanding of the discussions at that meeting whichpreceded the letter of April 8, 1970?

A During the meeting held at Mr. Ballon's office, we had reviewed the proposals to be made to unsecured creditors. Mr. Ballon at that meeting, or a prior one -- I think it was at a prior one -- had suggested that we offer unsecured creditors ten percent also indicating that American Viscose, which had a claim of over $125,000, might be put into a separate category because of the pressures being exerted by that particular creditor.

In other words, that creditor was more aggressive than the others, it was Mr. Ballon's suggestion that perhaps we might arrange to pay American Viscose fifteen percent, if at all possible.

As a result of my meetings with Mr. Ballon on that particular day, or shortly before that time, I had indicated to him that I would recommend a pay out to unsecured creditors of twelve-and-a-half percent. I would also recommend that we do everything possible to arrive at an understanding with the Internal Revenue Service.

He testified earlier that the claim originally asserted by the department was approximately $1,300,000 was later reduced to $455,000, but obviously those funds were not available to pay the government in full.

It was discussed at that meeting, and other meetings, as to the procedures to be adopted in attempting to prevail upon the government to extend the pay out of the government claims over a period of ten years.

Mr. Ballon also suggested, in the course of that meeting and other meetings, that the legal and accounting fees incurred by Neisco since the filing of the Chapter Eleven petition, aggregating $85,000, should be absorbed by the Pension Fund Trustees, as andwhen the plan was finalized and consummated.

He also requested that arrangements be made as to the firm of John Allan, which held stock in Nederland's lines, as collateral security for Neisco's debt to it.

It was his request that the fund make such arrangements as was required to see to it that that stock was released to the Horvaths.

THE COURT: May I have the date of this meeting, please?

THE WITNESS: The meeting was the forepart of April or the latter part of April, 1970.

THE COURT: Late March or early April, 1970.

MR. SCHWARTZ: Yes.

THE COURT: You say at this meeting that Mr.

Ballon suggested tha; the trustees should absorb legal and accounting fees totaling some $85,000?

THE WITNESS: As part and parcel of the plan of arrangement.

THE COURT: As part of the plan of arrangement.

THE WITNESS: In other words, these funds that Mr. Ballon was requesting reimbursement had been incurred and paid by Montmartre, and these involved accounting fees and legal fees to his firm, and it was his request that Montmartre be reimbursed by funds made available by the Pension Fund Trustees.

THE COURT: I see. So these were monies that had already been paid out for these sort of services by Montmartre?

THE WITNESS: That's right.

THE COURT: So we are not talking in this context about fees to the Ballon firm in respect of the Neisco rearrangement?

THE WITNESS: No, sir.

THE COURT: All right. Go ahead.

BY MR. SCHWARTZ:

Q Continue.

A The question was did we reach an understanding on those two items. The answer is no, no understanding whatsoever. Another time that was discussed and no understanding reached was that Ernest Horvath was to be employed as a consultant for life and paid $52,000 a year by Neisco.

Another item discussed and no agreement reached related to the reconstruction or reconstitution of the mortgage held by the Pension Fund on Montmartre. No understanding reached.

He requested that the fund subordinate its mortgage to a construction loan which was then being considered by Mr. Horvath to improve or add an addition to the Montmartre Hotel in Miami. But again no understanding was reached on that issue.

Mr. Ballon also requested that the Pension Fund advance sufficient funds to Montmartre to purchase the fee interest in that subsidiary corporation to which I made reference earlier.

Neisco was to reimburse -- on that issue, too, it was rejected.

Another item related to reimbursing Montmartre for the use of its New York offices by Neisco. It was his request that Neiscq, by reason of obtaining additional funds from the fund, the Pension Fund, could reimburse

Montmartre to the extent of $20 to $45,000. Again, no understanding.

Another demand made, and it was his belief that this required additional advance by the Pension Fund of $50 to $75,000. Again, we indicated -- or I indicated to them that the Pension Fund Trustees would not entertain, in my judgement at least, advancing monies for these purposes.

Mr. Horvath, through Mr. Ballon, also requested that we make arrangements to see to it that the Craftspun stock, which held all Montmartre properties, were given to him. Again, no understanding was reached.

There was also another item that was discussed at that time, and that related to life insurance policies. Apparently, with the filing of the Chapter Eleven petition we requested and obtained from the -- from Neisco, or the Horvaths, I'm not very clear where it originated from, it might have originated with Neisco, an assignment of all the insurance policies on the life of George Horvath and Ernest Horvath.

It was Mr. Ballon's request that we return those policies so that the Horvaths could acquire them in their personal names.

Other items discussed, and to which no agreement were reached, were the following: There were three textile mills in the Carolinas. It was Mr. Ballon's request that one of the textile mills, whether it be the Belmont or the Mayo, be transferred to Ernest Horvath free and clear of all claims and liens.

It was a further request of Mr. George Horvath, speaking through Mr. Ballon, that two other textile mills, which I believe were located in South Carolina, would be delivered to George Horvath separately and clear of any claims and liens. This included both real estate and machinery. Again, no agreement was reached. As a matter of fact, the requests were rejected.

Q Was there another conference at which you were present with Mr. Ballon on April 20, 1970?

A I cannot pinpoint the date, but, as I said earlier, I have been in New York on a number of occasions talking to Mr. Ballon and to Mr. Itzler.

Q I show you plaintiffs' Exhibit 4, a letter dated April 21, 1970, and ask you whether that would enable you to fix the date?

A This letter apparently confirms the fact there had been a meeting in New York on April 20, 1970.

Q Can you tell us what the subject matter of that meeting and the discussion there was?

A It was a repeat performance of the prior meeting. The demands were comparable except that in the course of that meeting it was suggested that the lifetime consultant agreement be given to Ernest at a salary of $26,000 per month -- per year and not $52,000.

Q At either of these two meetings --

A -- and they also scaled down the demands as to the return of life insurance policies so that in lieu of having all the policies which aggregated in excess of $2,000,000, that the fund would release its hold on life insurance policies each in the sum of $250,000 and transfer them respectively to the Horvaths.

If I may just quote from from Mr. Ballon's letter to me, third paragraph --

MR. KNIGIN: Your Honor, I think it is inappropriate for this witness to select portions of the letter and read quotations. The entire letter is in evidence. If anything about that letter refreshed his recollection, I think that would be a more appropriate matter to testify to.

THE COURT: I will permit a quotation at this time. Go ahead, Mr. Radom.

THE WITNESS: If the items hereinafter recited are satisfactory, it is my suggestion that we arrange to incorporate them in the agreement so that we may govern all future actions in accordance therewith, and without any future problems arising between the parties. As usual, this letter is written entirely without prejudice and shall not be used by the parties against each other or for any purpose whatsoever unless the same is consummated."

Q Was there ever an agreement executed by the parties in respect of any of these parties?

A No, sir.

Q Let me ask you specifically in relation to these two meeting in April, was there any discussion of any kind with regard to fees of Mr. Ballon's firm?

A None.

Q I think you told us that the first occasion on which there was any discussion of fees was sometime in August of 1971. Can you tell us what that occasion was and who that discussion was with and what was said?

THE COURT: Mr. Sulzer, read back that question.

(Read)

THE WITNESS: This conversation occurred in the corridor of the Bankruptcy Court, right outside of Judge Babbitt's courtroom, or in the clerk's office -- I believe it was in the corridor.

I inquired of Mr. Itzler that if we were able to finalize our understanding with the government and other items which were still in the process of negotiation, what his requested fee might be. I want to make it abundantly clear that if the program or plan was put into effect and consummated that it was certainly contemplated that included in the funds to be made available would be costs and fees of administration.

Absent at consummation, nothing was to be advanced. As a matter of fact, the security interest held by the Pension Fund Trustees took priority over all the expenses of administration except referees and salary dispensement.

In any event, in response to my question Mr. Itzler said $100,000. My resort was, "Oh no, you must be kidding. $100,000 " He said, "Yes, that is it, $100,000." I said to him, and this was in the presence of Mr. Vogel, who was also standing there -- the three of us were standing in the corridor, I said, You had best go to court and make your application." He says that is where he was going because that is just precisely what the amount his officers were seeking to be paid for servics rendered to Neisco in connection with the Chapter Eleven proceeding were.

MR. KNIGIN: I'm sorry, but I missed the date of this discussion.

THE COURT: August of 1971.

MR. KNIGIN: Thank you, your Honor.

THE COURT: In the corridor outside Judge Babbitt's court. Right?

THE WITNESS: Right.

Q Were there any subsequent discussions with Mr. Itzler about his firm's fees?

A Oh, yes. When I advised the Court that we -- that the Pension Fund Trustees had elected to withdraw their support and were not going to fund any Chapter proceeding, he then inquired as to whether or not we intend to provide compensation to him and others involved in the proceeding. I said the answer is no.

Q What did he say to that?

A I don't recall what his reaction to it was, except that it was rather apparent that we might be exposed to -- I'll just withdraw that statement.

MR. KNIGIN: I didn't hear the last answer, your Honor.

A It's really not responsive. I can only give you an impression which I had.

Q Mr. Radom, in your practice in bankruptcy, have you become familiar with General Order 44?

A I have.

Q Is that now the same as -- its purpose, at least, as Rule 215 of the bankruptcy rules?

A In substance it is absolutely the same.

Q Are you familiar with what requirement of General Order 44 that in disclosing -- making application for employment of counsel as counsel for a trustee or debtor in possession, there must be a disclosure of all connection with any person having an adverse interest.

A I understand that to be the law.

Q Can you tell us what, in your opinion, as a bankruptcy practitioner, the word "connection" connotates?

A If I might just back up to explain this entire procedure. The same court rule or bankruptcy rule to which you alluded does not disqualify an attorney representing a general creditor from representing a trustee or receiver in bankruptcy.

On the other hand, there is a direct conflict at all times between a secured creditor and a general creditor, and the general creditor is represented for all purposes by a trustee or receiver. The general creditor acts primarily through the trustee and receiver in a bankruptcy proceeding, and in this situation here, under

Chapter Eleven, the debtor in possession, by virtue of Section 342, has all the powers and rights of a trustee in bankruptcy; hence, the debtor in possession, if it exercises its proper responsibility, must, if at all possible, challenge the validity of all secured understanding agreements, a)either to invalidate, or b) if there is anything improper between the borrower and the lender, to have the lender's interest subordinated to the interest of all general creditors.

It is an evil which the rules recognize did exist in the past. And for these reasons it makes it abundantly clear that full disclosures must be made, otherwise not only is the applicant -- the attorney for the trustee or attorney for the debtor in possession deprived of its compensation, but also, if it happens to be the trustee or receiver who sanctions the employment of an attorney knowing of the adverse interest and not disclosing it, he too, would be deprived of his compensation. The two are absolutely incompatible. One cannot represent a trustee in bankruptcy and have a private undertaking, or even a public undertaking with a secured creditor whose job it is for him to challenge, if at all possible.

THE COURT: Is that true even in a situation where the lien creditor is contemplating funding the arrangement, and without such funding there probably would be no receiver for general creditors at all?

THE WITNESS: That becomes a matter of judgement. But the responsibility still exists. At the inception of a proceeding one never knows, at least we don't, the extent of the liabilities, what could be proven against the estate, how much was owing to the government, and, therefore, an attorney coming into a case, and having a private understandingreaching an understanding with the lien creditor, he disqualifies himself completely from representing that debtor in possession or trustee.

There is just -- there cannot be any qualification of that statement. It is just black or white.

THE COURT: At least, I gather, you say he must make a full disclosure. Whether disqualification follows or not -- that is another question.

THE WITNESS: I daresay that I cannot envision where there would not be an automatic disqualification. It would have to be.

This does not, however, run counter to your observation that perhaps under certain circumstances, is it prudent, is it for the best interest of the estate to continue the lien,to continue while other funds are made available for the creditors, but this is a business judgement which takes place at a later time, much later perhaps, but not at that time.

THE COURT: All right, Mr. Schwartz.

BY MR. SCHWARTZ:

Q In your opinion, as an expert in bankruptcy, was it incumbent upon the plaintiffs in applying for their appointment as attorneys for the debtor in possession to disclose any agreement that they had, or claim they had with the Pension Fund regarding the payment of their fees?

A No question. And I support that statement by making the following observation: It is not at all reasonable to expect a lawyer who has been assured of a $100,000 fee, if that were the case, to act independently and devote all of his efforts and zeal to the protection of a group whom he is supposed to represent and challenge or attempt to invalidate a lien. The two are inconsistent. The amount involved is so staggering here as to deprive him of his independent judgement.

Q We had some mention of the word "connection" as used in General Order 44. What does the word "connection" mean to you in that -- as it is used in the statute?

A I think Mr. Itzler summarized that rather well. I think it relates to does the attorney have any present or prior relationship with the -- with a secured creditor, with an existing creditor who might have a conflict with the estate. Has he represented a stockholder in the past which would deprive him of representing the trustee? Has he represented the debtor on other occasions?

The vice or the evil is to make the fiduciaries and their attorneys completely responsible to the group they are supposed to represent and not have a fractured or fragmented situation by secret deals which they allege took place here.

Q In your opinion, is an agreement for the payment of fees, whether it is to be paid directly or indirectly, a connection within the intendment of General Order 44?

A No question in my mind. If true.

THE COURT: No question if it is?

THE WITNESS: Yes.

MR. SCHWARTZ: Your witness, Mr. Knigin.

MR. KNIGIN: Should I commence cross-examination. I'm sure we will go beyond the luncheon recess.

THE COURT: Why don't we begin, Mr. Knigin?

CROSS-EXAMINATION

BY MR. KNIGIN:

Q Mr. Radom, you have indicated you represent the fund; is that correct?

A I did represent the fund.

Q You are here today on their behalf, aren't you?

A I presume so, yes.

Q And you are helping to defend the claim that has been brought by Ballon, Stoll & Itzler against them; is that correct

A That's correct.

Q So to that extent you have a vested interest in being here; is that correct?

A I don't know that I quite agree with that characterization, but I prefer to describe it in another way.

Q You are certainly trying to help the fund resist the claim?

A Right.

Q Now, along those lines, could you tell me as you sit here today, is your opposition to the claim imposed by Ballon, Stoll & Itzler that of the fact that Ballon, Stoll & Itzler violated the bankruptcy law or is it that there was no agreement between the fund and Ballon, Stoll &

Itzler for the payment of those fees?

MR. SCHWARTZ: I object to the question, your Honor. The witness is not here to oppose Ballon, Stoll & Itzler, he is here to testify to the facts and I think he's testified to facts. He gave his opinion as an expert. I think the characterization by counsel is completely unjustified.

THE COURT: I will take the -- the witness has testified along certain lines and in aid of certain defenses on direct examination, and he was a participant in all of these discussions, so it is helpful to the Court, I think, to focus somewhat more sharply throughout the testimony of this witness on the precise grounds that the defendants resist the claim.

Is it solely on the basis of alleged transgression of General Order 44? Or is it that the defendants claim that no contract exists?

Mr. Radom was present at the creation or non creation of all these events. The question is proper.

MR. SCHWARTZ: The point is that Mr. Radom is not the counsel for the defendants in this action. Our firm is. He's a witness. Our pleadings indicate very clearly what our objections are based upon. I don't think Mr. Radom -- I don't have any doubt of his competency, and

I probably know what his answer would be, but obviously he is not the one responsible for the Fund's position in this case, we are.

THE COURT: I understand that, Mr. Schwartz. On the other hand, he is a rather unusual witness. I will accept the answer for what it is worth. Would you like to hear the question, Mr. Radom?

THE WITNESS: The Fund is resisting payment because there was no agreement. Secondly, in answer to the latter part of your question, because of the flagrant disregard of the Court rule here, if an agreement was in effect made, I would still believe that the Fund would be justified in objecting to it as contrary to public policy.

Q Mr. Radom, that is the part that I'm having difficulty understanding. Let me ask you the question again in a slightly different way: You have testified there was no agreement; is that correct?

A That's right.

Q Well, if there was no agreement, then there was nothing for Ballon, Stoll & Itzler to reveal, then consequently they could not be guilty of an investigation under the Bankrupcy Act; is that correct?

A That's right. I think that is precisely what happened here.

Q So that when you bring up the issue concerning the investigation under the Bankruptcy Act, you are presuming the existence of an agreement; is that correct?

A You are not characterizing that correctly at all.

Q Would you clarify that for me?

A Mr. Schwartz asked me my opinion as an expert whether, given this set of facts, did the plaintiffs abuse their position by failing to make a proper disclosure. I gave my answer. I gave an affirmative answer.

Q Do you consider that to be a hypothetical question?

A I do.

Q And therefore, you think -- therefore, is it your testimony that that question really has no relevancy to this action?

MR. SCHWARTZ: I object to that question, if your Honor please. There is a great deal of relevancy as a hypothetical question.

THE COURT: I think that is improper in form, Mr. Radom. I understand what is going on here, they are pleading in the alternative.

Q You described, Mr. Radom, you characterized the understanding of the conversations with the Ballon, Stoll & Itzler firm, if any, on the question of fees as "secret details," is that correct?

A No. I was -- if what they say is true --

Q Yes.

A -- I don't think it was disclosed to anybody -- nobody, and therefore remained in the realm of secrecy.

Q If it had been revealed, as an expert in the bankruptcy field, Mr. Radom, would your testimony be the same?

A If it had been revealed, there was just no question in my mind that they would not be sitting there today, because the referee -- the bankruptcy judge would have disqualified them from acting as attorney for the debtor in possession.

Q I don't think you exactly responded to my question, Mr. Radom.

Do you classify this, the understanding that was alleged by Mr. Itzler and Mr. Ballon, as a secret deal in violation of the Bankruptcy Act?

MR. SCHWARTZ: If your Honor please, I don't know quite what counsel is even referring to. I don't see how that question can be answered.

MR. KNIGIN: He used the words, your Honor. The witness said that the Court does not countenance secret deals and there should be a revelation made. I want to know if he classifies this as a secret deal?

THE COURT: Assuming there was an agreement?

MR. KNIGIN: He says there was none, but nonetheless he said that the Court doesn't countenance secret deals. So again, presuming there was an agreement, because he doesn't admit one, does he classify -- if there had been such an agreement, would he classify that as a secret deal, as the facts are indicated in this case?

THE COURT: Do you understand that, Mr. Radom--

THE WITNESS: I understand the question. When you use the phrase "as the facts are indicating in this case" no. If you assume the allegations as being true that Ballon, et al, have made, the answer very definitely is yes, it was a secret deal because it hadn't been disclosed by proper affidavit form.

Q Now, Mr. Radom, you see it is so important that I understand your answer because of the questions that are to follow, so I don't mean to be overbearing, but may I ask you this question again: Presuming for the moment that there had been an agreement between Ballon, Stoll & Itzler and the Fund, such as the one that Itzler and Ballon testified to, and taking into consideration that you know of this case, that is the Neisco case, would you then classify such an agreement, if it existed, as a secret deal?

MR. SCHWARTZ: If your Honor, please, that question is inconsistent in its wording. How can he assume something which he says never happened and relate that to things that he said did happen? It is completely unanswerable on a logical basis.

THE COURT: It seems to me part and parcel with the General Order 44 requirements.

I do recall from the witnesses prior testimony the phrase "secret deal" it is floating somewhere around in my consciousness, although I'm not exactly sure of the context, and I gather Mr. Knigin is attempting to focus on or further clarify that phrase; is that correct.

If you can understand the question, Mr. Radom, I'll permit you to answer it.

A I'll try again. Assuming all the facts that you have described, solely on a hypothetical situation, if there had been an agreement between the Pension Fund Trustees and Mr. Ballon to pay him a $100,000, regardless whether he spent an hour or a thousand hours, or otherwise, and he didn't disclose that in his affidavit he filed with the Court, I wasn't aware of it, then I say that they concealed a very material fact from the Court. And I so accuse them of so doing, if that is true. And I don't think it is true. I don't think they deliberately misled the Court.

Q Mr. Radom, you were present at a great many of the court proceedings, were you not?

A Most of them.

Q You kept traveling back and forth from, I think your office is in Detroit, isn't it?

A That's right.

Q And you kept coming into New York for the sole purpose, was it not, for the Neisco proceeding?

A Primarily. During that period of time, yes.

Q You were being paid by the Fund for that purpose, weren't you?

A That's right.

Q Including your traveling expenses?

A Right.

Q Now, Mr. Radom, is it your testimony that there never came a time during all those times that you were present where the issue of the Fund funding the bankruptcy, including administrative costs,were discussed in open court with the referee?

A That is not my testimony.

Q Well, did such a conversation or discussion take place in open court?

A It did.

Q And did the representatives of Ballon, Stoll & Itzler indicate to the Court where it was expected those funds were coming from?

A The Court was so advised, yes.

Q And who did they say?

A I want to make it abundantly clear --

Q Could you just answer my question, who --

MR. SCHWARTZ: If your Honor please, the testimony again will disclose what was said. I don't think the witness ought to be asked to summarize what was said over the course of two years of testimony before the referee.

THE COURT: He can answer the question. It is a question of a subject of discussion which came up before the bankruptcy judge. I think Mr. Radom recollects it.

THE WITNESS: I recollect it very well.

Q Yes.

A That was that if a plan were formalized, adopted by creditors, confirmed by the Court, but bearing in mind these other collateral issues which had not been resolved, but assuming all these things took place, it was contemplated that the Pension Fund would provide the required monies to take care of the unsecured obligations, to the extent indicated, take care of the tax obligations, to infuse money to take care of administration costs and expenses, including the fees of Ballon et al., if the plan was consummated.

Q Let's just hold on to that for a second, if we may.

Would you say that that was an understanding between the Fund and Ballon & Itzler?

MR. SCHWARTZ: I object to that, the form of the question, if your Honor please.

A Let me respond in this way, Mr. Knigin, if I may --

THE COURT: I'll overrule the objection.

A (continuing) In order to obtain a confirmation by the Bankruptcy Court one must -- a debtor company must make a deposit. That deposit includes enough money to pay administration expenses and fees. It was always contemplated that these funds would be made available, providing everything was settled -- it was not a piecemeal approach, but everything else was settled, and a final order of confirmation was entered, then the Pension Fund, under those circumstances, would be provided the funds required.

Q All right, now let's understand this --

A Otherwise they were proceeding at their peril.

Q I'm sorry, the last part was "otherwise they were proceeding at their peril?"

A That's right.

Q By the way: Did you have any letters addressed to Ballon, Stoll & Itzler in which you said, "Remember, if there is no plan or adoption,that you are proceeding at your peril?"

A It wasn't necessary.

Q It wasn't necessary? By the way, this is not withstanding all the letters of Mr. Ballon to you; is that correct?

A He never mentioned fees there.

Q He didn't?

MR. SCHWARTZ: If Mr. Knigin would please stand back so I can see the witness --

MR. KNIGIN: I'm terribly sorry.

Let me ask you something, you just testified a little while ago -- let me see if I can put my hand on it. Just to make sure now that we have it clear, Mr. Radom, you have indicated that it was not the indiscretion of Ballon & Itzler which you have indicated as your defense to this action, but it was the fact that there was no contract, no agreement to pay the fee; is that correct?

A I don't think you are quoting me correctly at all.

Q Did you not state that there was no agreement to pay the fee?

A If you would indicate --

Q Could you speak up a little louder, Mr. Radom?

A I think I'm having trouble when you say did I, more or less implying that I, individually, had an understanding. Did the Pension Fund Trustees have an understanding? The answer is no, they did not.

Q Mr. Radom, I think we are getting a little afield. Let's see if we can stay right on the topic. The question I asked you initially, the first question on cross-examination was: What was the basis for the defense that you understand; was it because Ballon, Stoll & Itzler didn't have an understanding with the Fund or was it because of their indiscretion under the Bankruptcy Act, and you have forthrightly said it was because there was no agreement; is that correct?

A The answer attributed to me is correct. I also, however, added to that. I said even if it were proven or demonstrated, I did -- I'll make the statement again -- I constituted the violation to be so flagrant, to use my prior expression, as to deprive these gentlemen of any fees whatsoever.

Q We will leave the ethical question aside for the moment. Let's focus our attention now to the fact that you answered to the effect that there was no agreement; is that correct?

A Yes.

Q Yet did you not just testify that it was clearly understood in the discussions before the Court that the Fund would pay all of the costs if there was a confirmation of a plan, didn't you just say that?

A I did.

Q All right. So then may we agree between you and me for the moment that at least if the plan was confirmed there was an agreement between the Fund and Ballon, Stoll & Itzler?

A No, sir, that is not a correct conclusion.

Q I see. All right. Would you tell me once more what was the understanding arrived at in open court, which you have just testified to, as to what would happen if there were a confirmation of the plan?

MR. SCHWARTZ: Again I must object to the question. The understanding arrived at in open court is in the minutes. Let Counsel produce it and the Court will see what the understanding, if any, was.

MR. KNIGIN: Isn't this witness allowed to testify to what he understood, your Honor?

MR. SCHWARTZ: No.

THE COURT: I will accept Mr. Radom's answer to that question.

Q Mr. Radom?

A There was no direct understanding between the Pension Fund Trustees and Ballon et al. We undertook to provide the funds, if certain things occurred, to Neisco. The obligation to pay Ballon was Neisco's and not that of the Pension Fund Trustees.

Q Okay, now we are getting even closer.

Do I understand now -- let me see that I don't characterize it incorrectly, do I understand then that you will concede in open court there was an understanding reached that the Fund would give the money to Neisco, who in turn would pay the bills of administration, if a plan were confirmed; is that the understanding?

A If you add to that the -- the settlement of the other issues as well, the answer is yes.

Q All right.. So to that extent, at least, and as you have further reserved about it, there was an understanding?

A Well, there was no question, sir, that there was a commitment made to the Court --

Q Okay. That is all. By the way, this commitment was made in open court; is that correct?

A No question about it.

Q And you were present?

A Yes, sir.

Q And the referee was present?

A Right.

Q And the attorney for the unsecured creditors was present?

A That's right.

Q Mr. Itzler was present; is that correct?

A Yes, sir.

Q And Mr. Vogel, your counsel was present?

A Right.

Q Is that correct?

A Right.

Q Based upon that knowledge, and considering these events, would you still testify that the agreement between -- the agreement that was testified to by Mr. Ballon and Mr. Itzler was, in your terminology, a secret deal?

A You are getting into two different areas entirely, sir.

Q Is your answer no that it was not a secret deal or yes it was a secret deal?

A You are alluding to two different understandings.

Q Let me ask you this, would you just answer my question, if you can, and if you can't just say you can't.

A If you are restricting, sir, your question solely to that which arose out of the arrangement proceeding, after it was filed, and not to any prior conversations which occurred, or allegedly occurred in Chicago, the answer is there was no secret deal.

Q No secret deal?

A But you must also bear in mind this, which you are unable to distinguish, apparently, and that is there are many Chapter Eleven proceedings which are aborted and counsel for debtors in possession receive little or nothing as a consequence.

Q Where there is a secret deal?

A No, sir. Secret deal has nothing to do with it.

Q You are talking about just Chapters Eleven in general?

A That's right. When I use the expression that we attorneys in the bankruptcy field often proceed at our own peril, we can work for months or perhaps years and at the end of the case receive nothing because of our inability, or the inability of the debtor to --

Q Just for the moment, Mr. Radom, we want the benefit of your experience, but may we try to focus our attention on this case:

You've testified that there was nothing said in Chicago about Ballon's fee; is that correct?

A Right.

Q But you say that there was something said in court about it; is that correct?

A Not specifically about Ballon's fee.

Q About all of the administrative costs?

A All administration expenses.

Q So we will be agreed then, based upon our own expertise and your own testimony, that if there was nothing said in Chicago then there could be no secret deal, is that fair enough?

A If you are withdrawing the --

Q Mr. Radom --

A Sir, you can't have it both ways. If you are withdrawing your claim that there was a negotiated deal in

Chicago, that is a secret deal. If you are saying did they expect to be compensated out of the Chapter Eleven proceeding if successful, the answer is yes, and we were to provide the funds, speaking about the Pension Fund.

Q I think you've made it clear, Mr. Radom. By the way, Mr. Radom, you stated the first time that you ever had any discussion with anybody at the Ballon firm concerning the fee for the Ballon firm was in August of '71; is that correct?

A As to amount, yes, right.

Q In August of '71, was that the first time you knew the amount of the fee or the first time you knew that the Fund was going to arrange to provide the funds for the payment of the fee?

A I'll repeat again, sir --

Q Will you just answer my question, Mr. Radom.

MR. SCHWARTZ: The question can't be answered the way he put it.

MR. KNIGIN: How do you know that?

THE WITNESS: I can't.

MR. SCHWARTZ: I will withdraw it and restate it. That is the better way of doing it.

Q You have indicated that you had a conference with Mr. Itzler for the first time concerning fee in August of '72; is that correct?

A That's right.

Q And you have further said that you are aware of the fact that the Court understood, in the presence of everybody concerned, that there was going to be a funding of the administration costs of the -- by including attorney's fees, by the Fund from sometime in the beginning of '70 right through to '71; is that correct?

A If a plan were finalized and the order entered confirming the plan.

Q You made that abundantly clear?

A As long as you qualify that.

Q Could you then tell us -- strike that question. Then may we presume that you knew the Fund was going to pay the fee if, as you have said, a plan was confirmed, early in 1970?

A Early in 1970 we didn't know whether or not it was prudent for the trustees to make any further investment. We were at that time assimilating the documents or assimilating the statistics, and if, per chance, it would be prudent to take it over, we were certainly going to finance it. You must bear this in mind, too, this was a very complex situation --

Q Mr. Radom, that is not my question.

We will get to that in a minute.

Mr. Radom, all I'm asking you, and I have somehow difficulty getting the answers -- maybe it is my fault -- my question was: Did there come a time before your conversations with Mr. Itzler in August of 1971, that you knew that part of the responsibility of the Fund, as indicated to the Court, was the funding of the plan, including administrative expenses, as you have said, in the event there be a confirmation, was that before the meeting with Mr. Itzler?

A Yes.

Q That is all I wanted to know.

Then will you concede at least for a moment that you knew prior to August of '71, that based on all those equivocations that we have discussed, that the Fund would ultimately provide the funds to pay the Ballon firm?

A First of all, I don't understand what you mean by all the equivocations and secondly --

Q All right, Mr. Radom, let's do it a step at a time?

A Yes, do it a step at a time.

Q When you had the conversation with Mr. Itzler in August of 1971, was that the first time you ever had any knowledge that there might come a time when the Fund would provide the money for the Ballon fee?

A It was always understood by me that the Ballon firm, in the event of a successful Chapter Eleven, would be entitled to apply and be paid compensation in an amount fixed by the Court.

Q Could you tell us what it was that you learned for the first time in August of '71 that you say was the first time you knew about the Ballon fee?

MR. SCHWARTZ: That is not what he said.

A The first time related to the amount of the fee because at that moment I was attempting to determine just how much they might be applying to the Court for the liens.

Q Is that your point, Mr. Radom, that in August of '71, that was the first time you found out the amount?

A That's right.

Q That is what I wanted to know.

Now, on April 8, 1970, Counsel showed you a letter that you marked for identification -- let me strike that question because I have asked it inappropriately.

I show you Plaintiff's Exhibit Number 5, a letter to you from Mr. Ballon, dated April 8, 1970.

I think you indicated that you received that letter from Mr. Ballon as a result of a meeting with him in New York; is that correct?

A That's right.

Q And that letter set forth what you said in response to your attorney's inquiry that these were the issues that were discussed at that meeting; is that correct?

A Right.

Q Now, I call your attention to paragraph one and ask you if you recall the letter stating this." One, in the pending Neisco Chapter Eleven proceeding, a plan of arrangement should be promulgated whereunder general creditors would be paid, and it is blank percent, in cash in full discharge of their claims. Under usual I.R.S. requirements the minimum amount which you will accept as a down payment will be that sum which equaled the entire payment made to general creditors. It is our belief that arrangements could be made to make payment of the balance due to I.R.S. over a period of possibly four years.
In addition to creditors, and the down payment to I.R.S., administration expenses would have to be paid. The funds necessary to consummate the plan are to be advanced by the Pension Fund."

Do you recall that?

A I do.

Q Now, when you received this letter, Mr. Radom, did you write back to Mr. Ballon and say to him,"By the way, Mr. Ballon, on your number 1, how much will the administration expenses be?"

A I didn't. It would be most inappropriate for me to have done so at that time.

Q I see. Now, April 8, 1970, was approximately six months after the first meeting in Chicago between Mr. Ballon and the members of the Fund; is that correct?

A Right.

Q Is it your testimony that six months after this proceeding had transpired, that it was the understanding of the Fund that they were to advance the monies, assuming confirmation and all those things, but didn't know at that time how much that money would be?

A No, sir.

Q That is not your statement?

A I say we didn't know the amount.

Q You didn't know?

A No. I had --

Q You've answered the question, Mr. Radom. Now, when Mr. Ballon sent you this letter and said that it is expected that the Fund would put up the money, you still didn't know how much it would be; is that correct?

A As far as administratinn fees and expenses?

Q Yes.

A The answer is no, I didn't know.

Q And you made no inquiry?

A I made no inquiry.

THE COURT: We will break for lunch now. We will resume at two o'clock, gentlemen.

(Luncheon recess.)

AFTERNOON SESSION

2:15 p.m.

(Open court)

J O S E P H S. R A D O M, resumed.

CROSS EXAMINATION CONTINUED

BY MR. KNIGIN:

Q Mr. Radom, do you recall the original arrangement for the payment of Ballon of the sum of $25,000 by Montmartre?

A When you say do I recall. I don't understand the question.

Q Do you have any recollection of that arrangement being made?

A Well, if I could anticipate your question in another manner, was I --

Q Excuse me, I don't mean to interrupt you, but it is a simple question. Do you have a recollection of it. I will ask you some questions about it. You can tell me yes or no. If you have no recollection you can drop it.

A Yes.

Q Do you recall that Montmartre issued a series of notes to Ballon of $5,000 each for the $25,000 fee?

A Yes.

Q Do you know whether or not that payment to

Montmartre was done at the permission of the Fund -- payment from Montmartre was done at the permission of the Fund?

A I don't think with the permission or consent. But we had no objection to it being made.

Q No objection. Did representatives of the Fund know that Montmartre was paying the $25,000 to Ballon?

A Yes, sir.

Q In fact, did Montmartre have a countersignatory that had been put in there by the Fund and was actually countersigning on the checks to Ballon?

A That's right.

Q At that time, when Ballon was receiving the $25,000 in fees, did you make any inquiry as to what the full fee would be for the Ballon office in connection with the Chapter Eleven?

A No, sir.

Q Was there any question in your mind that the $25,000 was a retainer for the Chapter Eleven proceeding?

A That is the way Mr. Ballon described it to me.

Q I would like to for a few moments explore with you this diagram that you have put on the board.

THE COURT: One moment, please.

(Pause)

Q I was just directing your attention, Mr. Radom, to the board on which you have some five corporations and then three more that you referred to, about eight corporations, including the Montmartre family of corporations, that you say were so interrelated; is that corrected?

A That's correct.

Q I notice that Masmo is up at the top. Is there any specific reason for that?

A Well, I wanted to illustrate the manner in which this particular group of corporations is structured.

Q Was Masmo an important part of this?

A It was.

Q Was that one of the corporations whose problems you said were sort of tied to the others?

A It was.

Q Was Masmo sort of tied to Neisco?

A It was.

Q Let's just think about this for a minute if we can together. Masmo was a corporation that was to be very soon after the initiation of this Eleven adjudicated a bankrupt; is that correct?

A That was not discussed or decided upon by Mr. Ballon until several weeks after our meeting in Chicago.

Q No, no, I'm not saying when it was suggested to you. I am saying in point of fact it occurred; is that correct?

A It did occur.

Q Just a few weeks later?

A Perhaps months.

Q All right. And Mt. Clemens Corporation was a totally inactive company, was it?

A To the best of my information and belief, yes.

Q And the Craftspun was just a holding company, wasn't it?

A So I was advised.

Q It wasn't an operating company?

A The way I was advised.

Q And the three other companies operated the Montmartre Hotel; is that correct?

A I wouldn't say operated, but were related to the Montmartre Hotel.

Q But it was all part of that transaction?

A That's right.

Q Would you agree with me then that the only viable -- that is the only company that was an operating company -- was Neisco?

A I indicated to you earlier that Montmartre was an operating company, it operated Montmartre Hotel in Miami Beach, Florida.

Q Except for the Montmartre family --

A Masmo was also not viable, but was active in that it owned properties in the Carolinas which were subject to the mortgages and security interests of the Pension Fund Trustees.

Q Mr. Radom, you have a nice way of trying to go back to things, and I don't mind that but I think, your Honor, Counsel can help you with that. We already disposed of Masmo--

A You were the one who asked me whether they were operatable companies.

Q Maybe you didn't hear my question. I will rephrase it. Masmo we agreed within a couple of weeks or months went bankrupt, straight bankruptcy, was adjudicated.

A That's right.

Q Mt. Clemens we agreed was a non-operative company.

A Sir, I don't like to have you characterize "we agreed" I merely said upon information and belief I gave you the answers.

Q Upon information and belief it was non-operating?

A That's right.

Q And Craftspun was a holding company, upon information and belief?

A Correct.

Q So the only other operating company was the Montmartre operating company; is that correct?

A Depending upon the time frame. I indicated --

Q We are talking about the time of the advent of this whole situation concerning Neisco, in that moment in time, what do we have, that is what I'm trying to get out?

A I have described that to you.

Q Let's leave it alone. Was there any other company in this whole family at that precise moment in time that you were discussing Neisco with Mr. Ballon, in the initial discussions; was there any other company, other than the Montmartre, that was an operating company?

A If a corporation, which has not been adjudicated a bankrupt, and still is in existence and owns properties, I assume that has a status of being not a more viable, but at least it is in existence. If you are saying was it actively operating and manufacturing materials, the answer would be no, I don't think so. At least I wasn't advised of it.

Q Mr. Radom, I don't want to fence with you. Isn't it true that all of these companies, through their interrelationships owed a lot of money to the Fund?

A Correct.

Q About $5 or $6,000,000?

A The figure I gave you this morning was $13,000,000.

Q Thirteen million dollars. And the Montmartre was having a lot of problems at that time, too, wasn't it?

A It was under foreclosure.

Q And Masmo was on the eve of its bankruptcy; is that correct?

A That's correct.

Q Neisco was an operating company, wasn't it?

A It was.

Q Now, was it not suggested by you to the Fund that the key to the whole situation, if the Fund was ever to recoup its loss or its loan was Neisco?

A No, sir.

Q It was never suggested?

A It was just a factor to consider. Just one of the ingredients.

Q Of all of the companies that are concerned in this whole profile, was there ever any company besides Neisco that you were successful in selling?

A That we were successful in selling?

Q Yes.

A We never did attempt to negotiate a sale. I don't understand your question.

Q Of any of the companies?

A I have lost contact with Neisco right after the court proceeding terminated, and frankly, I don't know what the status of it is today. It may have been so.

Q Do you remember an attempted sale of Neisco to Mr. Eisenrod?

A This was part and parcel of the discussions which were on-going during the pendency of the Chapter Eleven proceeding.

Q My question to you is that during that same time, did anyone try to sell any of the other companies? Just yes or no, Mr. Radom, that's all it takes.

A In answer to your question, I'm not aware of what attempts were made to sell. I'm not aware of any.

Q Now, you testified earlier that all of these companies and all of their related problems were intimately related to the Neisco proceeding; is that correct?

A I didn't say that.

Q Oh, you didn't. Let me see if I can clarify that for myself.

Didn't you say that the problems that had to be worked out between Ernest Horvath and his contract with Neisco, and the insurance policies, and the I.R.S., and the Masmo problem, and I think you mentioned a couple of others, all were related to whether or not you go forward to the funding of the plan?

A That's right. That is somewhat different than your prior question.

Q That was my question. I'm sorry I didn't make it clear the first time.

Is it therefore your testimony that without these ingredients being resolved you were directed by the Fund not to go forward with the funding of the Neisco plan?

A That's right.

Q You are sure of that?

A Yes, sir.

Q Did you ever tell the Court anything to the contrary?

A Well, I don't know that I quite phrased it that way in court. I don't know that I alluded to these other problems we were having in the court proceedings, no, I didn't emphasize that. But in the course of my many discussions with Mr. Jack Polish and Mr. Itzler, they were constantly discussed and reviewed.

Q Mr. Radom, I only asked you one question, I don't know which one you answered. The question I asked was: Did you ever tell the Court anything to the contrary about the interdependency of one item with the other?

A I would only have to reply in this way: The court record speaks for itself. Frankly, I have no independent recollection either way at this moment as to what I said.

Q All right. I refer you to the minutes of the Masmo proceeding of February 1, 1972, before the Honorable Roy Babbitt, who was then a referee in bankruptcy, now a judge in bankruptcy.

I refer you to page --

MR. SCHWARTZ: What date?

MR. KNIGIN: February 1st, 1972. The page number, starting on page sixty-eight: This had to do with a bid made by the Fund in the Masmo case, which is what the colloquy was about, and the referee says, starting at the bottom of page sixty-eight, line twenty-three, Mr. Schwartz:

"THE REFEREE: I think we will adjourn Masmo until 1:30. Does the contents of this sale in Masmo make any difference?

"MR. ITZLER: As I understand it, Mr. Radom stated the last time that if he were unsuccessful in having the trustee accept his bid, or eventually accept the bid by the Pension Fund, then the Neisco matter could not be confirmed.

"MR. RADOM: I might have made that statement. I want to clarify it this morning, that one has nothing to do with the other."

Do you remember making that statement?

A I don't recall I ever made that statement. If the record says I made it, I made it.

Q And the referee saying, "Could I confirm Neisco if this sale does not go through to you?" And you stated, "Mr. Radom: Yes, your Honor." The referee said, " I could?" And Mr. Radom said, "Yes, your Honor." Referee said, "I misunderstood." And then it was adjourned to 1:30

Do you recall that?

A If that is what the record says.

Q Okay. Now, --

A Would you tell me the date of that hearing?

Q February 1, 1972.

MR. KNIGIN: Your Honor, I presume that pursuant to the stipulation with Mr. Schwartz that all of these minutes were deemed marked in evidence.

THE COURT: They may be so deemed.

MR. KNIGIN: Thank you, your Honor.

Q Now, Mr. Radom, do you know who Mr. Rugendorf is?

A I do.

Q Who is he?

A He is an associate of Mr. Sol Eisenrod in New York City.

Q Mr. Eisenrod --

A An accountant by profession -- I don't think he's a certified accountant or public accountant, but he does accounting work primarily.

Q I'm sorry.

A He does acoounting work primarily, but not in thepublic practice though.

Q Do you know whether his services were utilized by the Fund in connection with the Neisco proceeding?

A They were.

Q Was he retained?

A Yes.

Q Was he paid a fee?

A He was.

Q And by the way, where is Mr. Rugendorf?

office?

A At the time that I was active in this proceeding they were located on Madison Avenue, New York City.

Q Do you know what his functions was in connection with the employment of the -- by the Fund?

A Primarily to countersign checks, protect the interest of the Fund during the pendency of the Chapter proceeding, to assure that the monies which were being advanced were being properly used and properly accounted for.

In other words, he oversaw the manufacturing operations as well. He was subject, however, to then existing management.

Q Was he sort of a watchdog for the Fund?

A He was.

Q Mr. Eisenrod, his office was also in New York, wasn't it?

A He shared offices. I might clarify that --

Q Mr. Radom, I appreciate your clarification, but your counsel will help you with clarification. I just asked a simple question: Mr. Eisenrod's office was also in New York, was it not?

A That's correct.

Q And he shared offices with Mr. Rugendorf didn't he?

A Right.

Q Was Mr. Eisenrod also functioning on behalf of the Fund in this -- in connection with Neisco?

A On an informal consulting basis.

Q All right. By the way, when Mr. Ballon came to Chicago the first time--I think that was November the 5th, 1969 --

A That is the date that he suggested. He's probably correct.

Q Yes. -- Mr. Teitlebaum was present wasn't he?

A Right.

Q He was an attorney?

A Right.

Q He's now passed away, is that right?

A That's correct.

Q And you were present?

A I was.

Q And your attorney?

A Right.

Q And Mr. Duffey was present?

A I think he was.

Q And he's an attorney?

A He is.

THE COURT: What meeting are we speaking of, Mr. Knigin?

MR. KNIGIN: November 5th, your Honor, in Chicago.

Q And Mr. Matheson was present; is that correct?

A That's correct.

Q And he is an attorney?

A He is.

Q Were there any other members of the board who were attorneys? Of the trustees, any others?

A At that particular time, no.

Q In any event, there were at least four attorneys there on behalf of the Fund; is that correct?

A I think that is correct, sir.

Q How about Allen Dorfman, was he an attorney?

A He is not an attorney.

Q I didn't think so. Now, when you had the subsequent meetings in New York, you were present, was that not so?

A At most of the meetings, yes.

Q There were times when Mr. Teitlebaum was present, isn't that so?

A That's right.

Q There was even a time when Mr. Duffey was present; is that correct?

A That's correct.

Q And although your memory -- maybe it is refreshed that there was at least one time when Mr. Matheson was also present.

A I didn't deny that earlier. That is right, he was there.

Q He was. So the four attorneys were also in New York when they met with Mr. Ballon;is that correct?

A On various occasions.

Q Is it your testimony that these four attorneys, including you, a specialist, or an expert in the field of bankruptcy, at no time, between November the 5th, 1969 and August of 1971, ever asked Mr. Ballon what his fee would be?

A That is my testimony.

Q Mr. Radom, did you care what Mr. Ballon's fee would be?

A Very definitely.

Q Mr. Radom, do you recall being in court, again now, on February 1, 1972, before then Referee Babbitt, and this colloquy taking place, starting at page 51: "Mr. Weinberg" the attorney for the creditors, from the firm of

Leinwand,Maron,Hendler & Krause, was speaking first at this point in the proceeding.

"MR. WEINBERG: I think as long as things are being put on the record, I would deeply appreciate it on behalf of the creditors committee if Mr. Radom would stand up and put into language what has been indirectly stipulated on the record about the $10,000 to be put up by the Fund as a good faith deposit leading towards confirmation. I would like to have a deposit made and be in a position to enter an order.:

And then by Mr. Radom. "In lieu of a deposit, I have suggested to you that the Fund, and I have been authorized to make this statement, will deposit $10,000 with the trustee in bankruptcy of Neisco if it is adjudicated. In the event that the plan fails at confirmation for any reason, the failing caused by the trustees of the Pension Fund --" And there is an interruption.

"MR. WEINBERG: Directly or indirectly?

"MR. RADOM: Directly or indirectly.

"THE REFEREE: Excepting it will be deposed with the disbursing agent.

"MR. ITZLER: May I ask Mr. Weinberg if we are permitted to file the consents?

"THE REFEREE: I have another problem with that

that I want to resolve. What are we going to do about administration expenses, fees and allowances?

"MR. ITZLER: I would like an opportunity to discuss that problem with the representative of the Pension Fund, in the event we cannot arrive -- you are talking now of attorney's fees?

"THE REFEREE: I am talking generally. The expenses of administration, be they creditor committee, attorneys, accountants, all of them.

"MR. ITZLER: I mentioned it to Mr. Radom before. We have not discussed it at length.' I would like to attempt to have the Pension Fund pay those -- these expenses as an outside party. If we can agree on a figure we will then make application to the Court for the granting of allowances. I am sure the creditors committee will do likewise.

"THE REFEREE: Mr. Radom."And Mr. Radom only responded, "There is nothing to be gained with respect to speaking about any conversations for allowances. Whatever the Court likes."

Do you recall that colloquy?

A I do.

THE COURT: What is the date of it, Mr. Knigin?

MR. KNIGIN: February 1, 1972.

MR. SCHWARTZ: That, your Honor, is all part of Exhibit J, for identification.

Q Mr. Radom, February 1, 1972, was almost six months after the announcement in court by you, on September 2nd, 1971, that the Fund was not going to fund the plan; is that correct?

A That's right.

Q And at this point in time, February 1, 1972, we were talking about a stipulation in which it was anticipated that one of the bases for the failure of the confirmation of the plan was the refusal of the Fund to go forward with the funding; is that correct?

A I don't know whether I comprehend that question. Can it be either repeated or rephrased, please?

Q Perhaps I can make it simpler for you, maybe it was a little cumbersome. Let me just reread you a very small portion. You said, Mr. Radom speaking again at the bottom of page 51, "In lieu of a deposit I have suggested to you that the Fund -- and I have been authorized to make this statement -- will deposit $10,000 with the trustee in bankruptcy of Neisco. If it is adjudicated, in the event that the plan fails at confirmation for any reason, the failing caused by the trustee of the Pension Fund --

"MR. WEINBERG: Directly or indirectly?

"MR. RADOM: Directly or indirectly."

Do you remember that portion?

A I do.

Q Do you recognize that at that point in time that we were already contemplating a trustee here?

A Yes, sir.

Q So we were no longer were talking Chapter Eleven, were we?

A That's right.

Q And at that point in time you were still, were you not, stating to the Court that the attorney's fees would be paid by the Fund?

A I didn't say that at all.

Q You didn't?

A All right.

Q All right. Mr. Itzler speaking at the top of page 53. " I mentioned it to Mr. Radom before. We have not discussed it at length. I would like to attempt to have the Pension Fund pay those expenses as an outside party." Referring to administration expenses. "If we can agree on the figure, we will then make application to the Court for the granting of allowances. I am sure the creditor's committee will do likewise."

The referee looked at you and said, "Mr. Radom?" And your answer is, "There is nothing to be gained with respect to speaking about any conversations for allowances, whatever the Court likes."

Do you recall giving that answer?

A I recall giving the answer, and the answer and the comments of Mr. Itzler support what I have been talking about and belie their contentions completely. At that late date in February, 1972, we will notice two years and three months after the alleged conversation took place in Chicago, Mr. Itzler is now asking about fixing his compensation.

Q Mr. Radom, will you agree with me that you were at least saying to the Court,"There is nothing to be gained with respect to speaking about any conversations for allowances; whatever the Court likes."

Were you at least saying to the Court it would be up to the Court to make a decision?

A No, sir.

Q You weren't saying that? I see. Then I must have misunderstood the testimony.

A I think --

Q Mr. Radom, that is enough. You've answered the question.

By the way, during all the time that these proceedings were going on, you were from time to time meeting with the trustees back in Chicago, weren't you?

A That's right.

Q And you were reporting to them the progress of the proceeding?

A Right.

Q And you were making professional recommendations to them?

A Right.

Q And at the same time you were appearing in court and making statements to the Court?

A Right.

Q Let me ask you if you recall, Mr. Radom, a meeting of the steering committee of the Pension Fund, which took place on July 31, 1970.

These are minutes that have been supplied as part of a defendant's answers to interrogations, and I am going to read a certain portion of them and ask you if you recall having made these statments, as indicated in those minutes.

Reading from July 31, '70, steering committee report. These are the minutes: "Speaking, Mr. Radom. Shall I report as to Neisco - Masmo?"

"MR. DORFMAN: Yes.

"MR. RADOM: This report relates to the various companies in which George Horvath has an interest: Neisco, Masmo and Montmartre.

The trustees from time to time, as you recall, authorized certain commitments to be made on behalf of the Fund, and we attempted, through a number of meetings held with Mr. Horvath and his attorneys, and accountants, to work out a program which would mean in substance the elimination of George Horvath from Neisco - Masmo, and he would then have the Montmartre upon which to concentrate.

Our most recent meeting was held last week in New York, and as a result, in my judgment nothing can be accomplished with him. Everytime we reached an agreement as to one point, he had half a dozen others he is seeking to put into effect. As a result, it occurs to me, we have no choice but to proceed with foreclosure, specifying specifically for foreclosure, the Montmartre in Miami Beach, and secondly, with respect to Neisco and Masmo. We can expect, as you may well know, a rather bitter fight and great resistance on the part of Horvath, but after a lapse of these many months, we don't have any choice whatsoever.

I will have a more detailed report for the trustee meeting, perhaps, and we will seek at that time specific authority to proceed with these various foreclosure matters to which I have just alluded.

I might say, Neisco has been operating in the Bankruptcy Court out of New York as debtor in possession. This Fund has made monies available to carry on the operations, and because of economic conditions prevailing in the textile industry, particularly, monies have been lost, but we do want to preserve that continuity of operation. If we can do so. It can be sold. But as far as Montmartre is concerned, it seems to me that what we have got to do is to seek to have a receiver appointed so the receiver can operate during the time these foreclosure proceedings are pending."

Mr. Weisser -- by the way, Mr. Weisser is the accountant who did the review of the Neisco need; is that correct?

A That's correct.

Q Mr. Weisser said, "The Montmartre occupancy rate is high as of last year." Mr. Ranney-- who I believe is one of the trustees--

A Right.

Q --said, "Do we need any action, Joe?" talking to you.

A Right.

Q And you responded," Mr. Radom : I don't think so at this time. I will make a specific report next week.

"Mr. Ranney: If you need the authority, it should be given to you.

"Mr. Radom: Perhaps we should seek authority at this time to proceed with foreclosure on all three companies, Neisco, Masmo, Montmartre, and I would recommend to the steering committee that we be given the necessary authority to do whatever is required.

"Mr. Dorfman: What is your pleasure?

"Mr. Duffey: With all due respect, but since we have a full board of trustees meeting next week, Thursday, and so there is no question in the court proceedings as to authority to bring the action, or what have you, maybe it would be better to wait for Thursday.

"Mr. Ranney: This would be a recommendation.

"Mr. Wolfberg:--

Is he a trustee ?

A No, an attorney.

Q "This is a recommendation and he will make a report to the full board.

"Mr. Duffey: I just don't want any question in the litigation.

"Mr. Dorfman: Is there a motion?"

Motion was made, seconded and carried to approve the recommendation, and Mr. Dorfman says, "It is so ordered."

MR. SCHWARTZ: May the record show, your Honor, that what Counsel has been reading is Exhibit F, Exhibit G attached to part of Exhibit F.

THE COURT: These are minutes of the steering committee meeting?

MR. SCHWARTZ: Yes.

THE COURT: I never heard minutes like that.

MR. KNIGIN: We have found, your Honor, that either there are a lot or none. There is no inbetween.

BY MR. KNIGIN:

Q In any event, just continuing with this, on August 6, 1970, just a week or so later, there is now a meeting of the full Board of Trustees. Do you recall that meeting?

A You have it there.

Q I'll read to you from those minutes.

"Chairman Ranney: Come to order.

"Mr. Mellman: -- That was the gentlemen with whom you were associated; is that correct?

A That's correct.

Q "-- I would like to make a report in the matter Neisco, Masmo and Montmartre. Apparently there has been a complete impasse as far as the negotiations are concerned. At any time when negotiation is close or agreement is close, Horvath comes up with increased demands so we therefore ask that the Fund authorize to proceed with foreclosure on all three of the parties.

"Chairman Ranney: The steering committee recommended that we proceed with foreclosure."

Your associate, Mr. Mellman said, "We want to make sure there is a record of the authorization to proceed with foreclosure proceedings.

"Chairman Ranney: What is your pleasure?"

Motion was made, seconded, and carried to comply with the recommendation of the steering committee in regard to Neisco, Masmo and Montmartre. Chairman Ranney said, "It is so ordered."

Now, during this whole period of time, Mr. Vogel, of the firm that is now representing the Fund in this lawshit, was your representative in this Bankruptcy Court; is that correct, Mr. Radom?

MR. SCHWARTZ: If your Honor please, that is not quite so. Schaeffer, Dale and Vogel first appeared, certainly, sometime in the middle of 1970 in the bankruptcy proceeding. I don't think they appeared before then.

MR. KNIGIN: Your Honor, I would call the Court's attention to the minutes of August 25, 1970, before the Honorable Roy Babbitt, in which Schaeffer, Kahn, Dale & Vogel, Esqs., are listed with the following appearances, special counsel for Joseph S. Radom and Leonard Mellman, attorneys for Central States Southeas and Southwest Areas Pension Fund, a creditor, 1501 Broadway, New York, New York, by Laurence Vogel, Esq., of Counsel.

MR. SCHWARTZ: That is exactly in accordance with what I just said, your Honor. We did appear in the proceedings at a certain time. I think the --

MR. KNIGIN: Your Honor, the --

MR. SCHWARTZ: I think the date we were first retained was about July of 1970. I can check. I don't have the exact date before me.

THE COURT: The witness can be asked about it and he can testify as to his own recollection of it. If further evidence is forthcoming by stipulation, that is fine.

BY MR. KNIGIN:

Q Mr. Radom, at the time that Mr. Vogel appeared in this court stating his appearance to be on behalf of you and Mr. Mellman, was he functioning at your instructions?

A He was.

Q Were you in communication with him concerning what steps he should take on your behalf in regard to this proceeding?

A I wouldn't say on my behalf. On behalf of the Pension Fund Trustees.

Q When you weren't present, did you advise Mr. Vogel how to act on your behalf?

A I'm confident that we conferred prior to every court hearing, whether I was in New York or otherwise, it was previously understood between the two of us; we communicated constantly. Anything he said on the record I will ratify and adopt at this time as being properly authorized.

Q Did you advise him as to what was going on back in Chicago?

A Well, there were a number of discussions occurring in Chicago, and I cannot state unequivocally that he was informed as to each and every conference or committee meeting. I attempted to keep him generally informed, yes.

Q Would you say, Mr. Radom, that the meeting that I have just read about, the steering committee meeting of July the 31st, and the board ratification of the resolution that emerged from that meeting of August 6th, represented a critically important matter?

A I don't disagree with your characterization at all. I think you are absolutely right, that it was critically important.

Q You were going to take a very, very definitive step in foreclosing on your equitable liens, weren't you?

A That was my recommendation.

Q I think my question was, that was a very formidable step?

A Certainly.

Q And that included Neisco, did it not?

A It did.

Q I'd now like to read to you, if I may, from the minutes of August 25th, 19 days after approval by the full board of the resolution which you just described, where Mr. Vogel, appearing in court as your attorney, at page 203 --

MR. SCHWARTZ: What date?

MR. KNIGIN: August 25th, 1970 at page 203 the following quotations, the referee speaking, "Mr. Vogel, do you have anything to add?

"Mr. Vogel: Your Honor, I don't want to underestimate the difficulty of the negotiations that have been undertaken, and I don't want to mislead the Court into believing that they have not been going forward well. They have been, and I think both sides have been bonafide in their attempts to reach a solution. I think, however, that it is unlikely that we will have a signed document by one week from now, and we have asked for the one-week adjournment simply to keep the matter, as Mr. Itzler said, before the Court, in the event that negotiations do breakdown and there doesn't appear to be anyway of working out an agreement, so we would therefore urge the Court to put it over for one week and we would reappear at that time to re-access the situation."

Based on your years of experience, Mr. Radom, as a bankruptcy lawyer, do you find Mr. Vogel's comments in open court consistent with the action that you had recommended to the board just several days prior to his appearance?

A There was a departure.

Q There was a departure?

A There was a departure for reasons that I'd be glad to explain to you.

Q By the way, were the reasons ever revealed to the Court?

A I frankly don't know what the record really reflects in that area at this time.

Q Did you ever come into the court around this time and advise the Court of the action that the Board of Trustees had voted to take?

A What month was that?

Q In August or September of 1971.

A Seventy-one, yes.

Q 1970, excuse me.

A Not at that time, I don't think so.

Q All right. Did you think it important that you advise the Court that a resolution relating to foreclosure on the Neisco secured interest had already been passed by the board?

A There is nothing irrevocable about any action taken by trustees --

Q It wasn't irrevocable?

A I Say, any action adopted or authorized by trustees, can,in the interest of the Fund, be changed.

Q Okay. Mr. Ballon at this time was working as the attorney for Neisco, wasn't he?

A Mr. Ballon was not seen on the -- was not seen in connection with Neisco from and after May of 1970.

Q Let me rephrase the question. You are right and I thank you for correcting me, Mr. Radom. The firm of Ballon, Stoll & Itzler were working on behalf of Neisco, were they not?

A That's right.

Q And you already had in open court, as you indicated the minutes show, said that it was the intention of the Fund to fund the plan if it was confirmed; is that correct?

A Well, if the pieces can be put together, yes.

Q And you said that in front of a representative of Ballon, Stoll & Itzler; is that correct?

A No question about that.

Q Did you ever tell a representative of Ballon, Stoll, & Itzler around August or July of 1970 about the resolution that had been adopted by the steering committee and the full board of the Pension Fund?

A I did tell --

Q Who did you tell it to?

A Mr. Polish.

Q Who?

A Mr. Polish.

Q Just a second, my question of you was the firm of Ballon, Stoll & Itzler, did you ever tell anyone in that firm about this resolution?

A I have no independent recollection. But Mr. Polish was affiliated in the handling of this case and appeared in court on behalf of Neisco.

Q Was Mr. Polish a representative of the firm of Ballon, Stoll & Itzler?

A No, but he was in-house counsel for Neisco and appeared at most of the court hearings.

Q Mr. Radom, let me ask my question again and perhaps we can clarify that answer. Did you ever tell anyone of the firm of Ballon, Stoll & Itzler of the fact that there was already a resolution upon the minutes of the Fund foreclosing the Neisco sucured interest?

A I have no independent recollection at this moment that I did.

Q Did you ever advise the attorneys for the unsecured creditors?

A I have. Not more than-- I had no more than contacts with Mr. --

Q Without us talking about the

consanguinity of relationship that you had with him, did you ever tell him that?

A No, sir.

Q Did you ever tell the accountant who was in the proceeding for Neisco about that resolution?

A Again, I had very little contact with the accountant.

THE COURT: Did you tell him, yes or no, Mr. Radom?

THE WITNESS: No, sir.

Q And yet, through all of 1970, '71 into '72 you continued to appear regularly in this court before the referee in connection with the Neisco matter, did you not?

A That's right.

Q Did there ever come a time, even when you indicated that the Fund would not fund the plan, that you ever told the referee that back in August of 1970 we passed a resolution to foreclose on the secured interest?

A I have no independent recollection of having advised the referee accordingly.

Q You have none?

A No, sir.

Q As a matter of fact, didn't you continually, during that period of time, represent to the referee that it was a continued intention of the Fund to fund the Chapter Eleven?

A If a program cold be formulated, satisfactory to the trustees, surely.

Q Okay.

Mr. Radom, during the hearing before the referee of September 2, 1971?

A I have no independent recollection. But if you have something there to --

Q If I was to tell you that that was the hearing when you advised the Court that for certain reasons the Fund was not going to fund the plan.

A I recall.

Q Do you remember appearing before the referee at that time and the following colloquy taking place -- I begin at page 3 -- "The Referee: Neisco, Inc. I suppose the first order of business is to find out whether the government has approved. Miss Freiman" -- by the way, you knew her to be the assistant U.S. attorney with whom they were attempting to work out an I.R.S. claim; is that right?

A That's right.

Q I'm sorry. "Miss Freiman: Yes, your Honor, I have been authorized by the Department of Justice to advise the Court that the attorney general has approved the stipulation which was proposed as modified by subsequent commitments from Vogel. These subsequent modifications were pertaining to restrictions of the loss carry forward and the continued participation or the anticipated participation of Mr. Eisenrod."

Remember that discussion?

A I do.

Q And the referee said, "That means you can solicit your acceptances or file them now, Mr. Itzler.

"Mr. Itzler: I can do better than that. I have all the acceptances. I am way over the number and amount.

"The Referee: File them.

"Mr. Itzler: I cannot, your Honor. We have agreed with the creditors committee that we shall not file the acceptances until the deposit of approximately $10,000.

The referee said, "Is made to whom?

"Mr. Itzler: Is made with the court.

"The Referee: The Court is not a depository of funds, Mr. Itzler.

"Mr. Itzler: Then we would make it with the trustee or a representative of the creditors committee, a good faith deposit. However, your Honor, I was notified this morning for the first time that the deposit will not be made available by the Pension Fund.

"The Referee: Why?

"Mr. Itzler: Or the Pension Fund does not intend to make the deposit available, I'm not sure of their reasons.

"The Referee: Supposing we find out. Mr. Vogel.

"Mr. Vogel: Yes, your Honor. You may recall at the last hearing we told the Court that it was possible at that time, in light of certain events that had occurred, that the Fund, through its trustees, might be unwilling to participate in a plan of arrangement.

"The Referee: Now?

"Mr. Vogel: Yes, your Honor, now.

"The Referee: And after eighteen months of carrying you?

"Mr. Vogel: At that time, your Honor, I notifiedthe Department of Justice of the fact -- of that fact also. I told them, when they asked me whether or not we would make certain modifications at that time, that I thought they ought to know that in light of certain events that occurred at that time --

"The Referee: Why?

"Mr. Vogel: There was an indictment of a man who was accused of taking a bribe from Mr. Horvath. At that time, as I have said, I notified the Department of Justice so that they would not be under any misapprehension in case the trustees decided that they did not want to go forward. I was notified on Monday that the trustees had voted at their last meeting not to go forward."

This was September 2nd, 1971, which is almost thirteen months after the resolution providing for the foreclosure.

"The Referee: Why?

"Mr. Vogel: Your Honor, I was just told that they didn't want to go forward with the plan. I am now communicating that to the Court. I immediately upon learning that communicated that to the Department of Justice and I was told that it was on the attorney general's desk and hadn't yet been accepted and he appreciated my telling him that fact so there would be no embarrassment to the attorney general. I told him at that time -- this was Monday -- that on Thursday we would have a definitive statement on the record, but I wanted them to know before that time so that no embarrassment would be caused, and I also notified the office of Mr. Heneker and he also was advised. I also spoke to Miss Freiman at that time. I now have stated everything I know, your Honor.

"Miss Freiman: Your Honor, there may be some misunderstanding here. I was advised by the Department of Justice that Mr. Vogel had promised that he would keep this open until a week, which was today.

"The Referee: I assumed all along --

Then he stopped, and he said instead -- "Mr. Radom, I don't mind telling you that I am not here to insist that companies come to the aid of businesses, but I have been carrying this for eighteen months. I think it comes with exceedingly poor grace at this stage that the trustees have suddenly decided they should not become involved after being in so long." Mr. Vogel said, "Your Honor, may I answer that, please?

"The Referee: What does the indictment have to do with it?

"Mr. Vogel: I was told by a high official of the Department of Justice a month ago that he was exceedingly embarrassed and understood quite completely our position in this case, that it had been dragged so long at their insistence not ours.

"The Referee: You gave me until today, that is why I addressed my remarks to Miss Freiman as an opening, because I was well aware of the fact that if the Department hadn't approved, you people were giving up. But now you give that reason you gave me that some fellow was indicted for something he should not have done.

"Mr. Vogel: It came to our attention, and it was on the record.

"The Referee: Why didn't you tell me then?

"Mr. Vogel: Your Honor, we did on the record, and if you will check the record you will see that we as attorneys stated that we didn't know what the trustees would do at their next meeting, but that it would be brought to their attention, and in light of the indictment we didn't know what the trustees would do. But we put the Court on notice that it might walk away and has in fact done so.

"Mr. Radom: I think the record is clear. I made it abundantly clear on the record, and to others involved in this proceeding, that by reason of the indictment, the trustees were going to re-evaluate their position and they have done so. The plan envisioned the continued collaboration of the Fund with members of the Horvath family. My reason of the serious challenge brought against a member by a consultant of the Pension Fund, this was decided this was not a course of action they decided to pursue.

"The Referee: They are going to try to clean the skirts that they didn't clean all this time? I raised the question of the funds involvement two years ago, wondering how it is that the Pension Funds and welfare funds get involved in dying companies. I even had suggested that the bureau become involved by looking into it, and was sure that this was a legitimate act of the Fund known to its trustees and that a calculated -- that ultimately it would be to the betterment of the Fund. Now you tell me because one fellow has been indicted it all is out the window, is that what you are saying?

"Mr. Radom: No, sir, I am not saying this at all. First, anybody whether he be part of the Fund at this time or a member of the Pension Fund group, if he did wrong he should be punished. We have no brief for anybody. On the other hand, if a member of the debtor group, Mr. Horvath, was engaged as an accomplice in perpetrating this fraud on the Pension Fund, attempted to lie on the record just six weeks ago, under those circumstances we have a right to reassess our position and we have done so, your Honor.

"The Referee: You know that Horvath is not involved in this case. I am dealing with a corporate debtor. Horvath has been out of the picture. I am dealing with a company with countless employees.

"Mr. Radom: We want those employees kept on the payroll. We hope that this matter can be continued.

"The Referee: How? Either it is you or nobody.

"Mr. Radom: I think that is probably correct.

"The Referee: Then it can't be continued.

"Mr. Radom: It can be continued without Horvath, in my judgement.

"The Referee: What does that mean? Is the Pension Fund prepared to go forward if we excise the remaining Horvath in this company, is that what you are telling me?

"Mr. Radom: The Fund is not an operator. I am suggesting this, however, that given time, and because our collatoral is substantially less than our secured debt, perhaps over a period of time a buyer can be found who can operate this company and keep these employees employed. That is all I can tell you, your Honor.

"The Referee: The Fund is out, completely out. If I adjudicate the company, the judgement has to be my own whether a trustee in bankruptcy will operate it for a reasonable period.

"Mr. Radom: We understand the risks involved.

"The Referee: But I am most exceedingly distressed. I don't think the Pension Fund has dealt with the Court in good faith. I know you have money. I know you have sustained losses, but I will assume you people knew what you were doing when you started. The mere fact that George Horvath is no good, or this fellow who has been indicted is no good, has nothing to do with the original decision to get involved with a company in financial ways.

"Mr. Radom: I think I rather object to the Court's characterization, your Honor, of our lack of good faith here, because we have acted in good faith. We have demonstrated our good faith by providing the funds.

"The Referee: Well, why don't you continue? The fact that one bad apple is in the box doesn't mean that the venture was ill-conceived to start with, unless you are telling me that maybe you should never have gotten involved in this, is that what you are telling me, Mr. Radom?

"Mr. Radom: I am not suggesting that at all, because I find it a little difficult --

"The Referee: I will withdraw it. I really should not put you on the spot to evaluate what the trustees might have done in their judgement.

"Mr. Radom: Years ago.

"The Referee: This is a most distressing kind of event, Mr. Radom.

"Mr. Radom: This is not a very happy situation for any of us, but I do want to assure the Court that there are over 300 employees involved here.

"The Referee: How many?

"Mr. Radom: Over 300. We have no desire to see them on the streets or on welfare. We would be prepared to provide the funds required to keep them going.

"The Referee: You mean if this case goes -- no. There will be a trustee who will come to the court for the exercise of judgement.

"Mr. Radom: We are prepared to rely on his good faith?

"Mr. Itzler: Your Honor, may I be heard?

"The Referee: What else is there to say? You have to be in the wings. You are dead.

"Mr. Itzler: Your Honor, I have a suggestion to make to you and perhaps the Court can see fit to act on it. Firstly, we agree that the creditors and the Court have been put upon by the Pension Fund, In fact, as late as approximately a week ago the Pension Fund evinced their intention to go forward by subordinating their position to a new loan."

By the way, on the issue of the new loan, Mr. Radom, do you recall that there was an additional request by Neisco for $500,000?

A I am aware of it.

Q And do you recall that you or one of your associates made an arrangement with an Illinois bank to loan that money to Neisco?

A The trustees did authorize and sanction the transaction, yes.

Q This was just a few days prior to this proceeding; is that correct?

A You have the correspondence on that. I don't know. I doubt whether it was a few days. I cannot fix the time period.

THE COURT: Mr. Knigin, I do want to say that

that was a vivid reading on your part of what I'm sure was a rather dramatic moment before the referee, but it was also rather time consuming. I assure you that I will read any section of the minutes which you ask me to read. I am very hopeful of finishing this case tomorrow because I have another case with out-of-town counsel waiting. So to the extent that lengthy readings from the transcript can be avoided, I hope you will keep that in mind.

THE WITNESS: Can I make a statement, your Honor?

MR. SCHWARTZ: Mr. Radom has to be in court tomorrow in Detroit. Can we fix a date for him to come back other than tomorrow if we don't finish with him?

THE WITNESS: I had an appearance schedule for this morning which had been fixed several weeks ago before the Federal Court there. I prevailed upon the judge to hold it until tomorrow at ten o'clock.

THE COURT: Let's finish with Mr. Radom today if we possibly can.

MR. KNIGIN: I will try to do that.

THE COURT: Are you currently engaged in a hunt for a document?

MR. KNIGIN: I am.

THE COURT: We will take a brief recess.

(Recess)

(Open court)

JOSEPH S. RADOM, resumed.

CROSS-EXAMINATION CONTINUED

BY MR. KNIGIN:

Q Mr. Radom, I just was, when we had the recess, I was looking for this letter. I show you this letter dated August 18, '71, which is Exhibit 19 in evidence, and ask you whether or not this would serve to refresh your recollection as to approximately when Neisco was being considered for a $500,000loan by a Chicago bank?

A I have observed the exhibit.

Q That was about August of '71; is that correct?

A Yes.

Q You may remember that my question to you was that that was approximately two weeks before this revelation of September 2nd, 1971, before the referee; is that correct?

A I have no quarrel with your conclusions.

Q As a matter of fact, the Fund at a meeting of June 11th, 1971, raised this whole issue about the

$500,000 loan; is that correct?

A If that is what the date appearing on the minutes is, I would accept that.

Q Was it not -- I won't encumber the record by reading the minutes again, but was it not the consensus of the Board of Trustees at that time that instead of giving the $500,000 to Neisco that instead they would ask Neisco to go to the bank, get the $500,000 from the bank and in order to assist the bank in making that decision to give them the loan, that the Fund agreed to subordinate the loans that they had given to Neisco during the pendency of the Chapter Eleven proceeding; is that correct?

A Is that a question?

Q Yes.

A I don't understand your question.

Q You don't understand. All right.

MR. KNIGIN: May I, your Honor, because it is just two short pages, maybe I can refresh the witness in this fashion.

A You don't need to refresh my recollection as much as you need to clarify your question. The question is --

Q Maybe I can do both at one shot. Let me try and stumble through. "On June 11, 1971, the following minutes of the full Board of Trustees of the Pension Fund.

"Mr. Dorfman: We skipped over number one in the book, Montmartre-Neisco, item number one, book number one, which we first reviewedthis morning. Number one, Montmartre-Neisco.

By reason of the fact that Neisco didn't have any operating capital at the inception of the Chapter Eleven bankruptcy proceeding the Pension Fund made arrangements to advance a sum not to exceed $1,500,000 to Neisco as debtor in possession, pursuant to an order of the Bankruptcy Court having charge of these proceedings. During this interim period, the debtor requires additional funds to carry on its operations. Their business has been increasing and the receivables are believed to be collectible. The debtor has applied to this fund for additional cash to carry on these operations in the amount of $500,000. It has been suggested that in lieu of having the Fund make any additional funds available, that Neisco, or the debtor in possession, apply to a bank for its current capital requirements.

Statement by Mr. Eisenrod that the $1,500,000 that was advanced by the Fund was sufficient for the operation, but because of the slow pay of the accounts receivable, and the inability of the collection of the accounts to pay for the payables, there is the necessity or the desire to borrow the $500,000, not as additional working capital, but so as to release the frozen accounts receivable. Motion was made, seconded and carried that the Pension Fund subordinate the certificate of $1,500,000 to a new certificate to the American National Bank and Trust Company of Chicago, who proposed to lend up to the sum of $500,000 on accounts receivable."

Do you recall that transaction, Mr. Radom?

A I do.

Q Was it essentially as outlined in those minutes?

A Yes, it was.

Q Now, as a result of that, do you know that the American National Bank and Trust Company requested an opinion letter from Mr. Itzler in which he would give his opinion as to the security of the subordinated loans that have been made during the Chapter Eleven proceeding?

A I had nothing to do with that part of it.

Q Do you know that it occurred?

A I see in your hands you have something to that effect, and I will not challenge it --

Q By the way, while we are on the subject of this -- these certificates of indebtedness, do you know what a certificate of indebtedness is?

A I do.

Q Would you say that it is reasonable to say that it is a preferred loan that is done under the auspices of the Court during a pending proceeding?

A In a bankruptcy sense, that is correct, yes.

Q May I just ask you to hypothesize for a moment, supposing the Fund had loaned the $1,000,000 to Neisco without the benefit of a Chapter Eleven proceeding, what would have been the net result of those monies being placed into Neisco?

A Well, I don't quite comprehend that hypothesis.

Q Let me put it to you this way: The Fund, at the time of the filing of the Chapter Eleven, was a secured creditor, at least as to those monies that had been loaned to Neisco prior to the filing of the Eleven; is that correct?

A That's right.

Q Would you agree with me that it had been pretty well agreed by everybody else that the amount of the security was less than the interest that it was securing, that is, the dollar interest?

A I didn't know. There were varied opinions.

My belief was that the Fund, as a liquidation possibility, was uncollateralized.

Q That is what I thought. Now, if the Fund had put in an additional $1,500,000 at that point in time as a loan to Neisco, they would have, at least to the extent of that loan, really become general unsecured creditors to that loan, wouldn't they?

A Not necessarily.

Q Well, we will agree, Mr. Radom, --

A In answer to your question, sir, if you give me the opportunity.

Q I'm sorry, I thought you had. I'm sorry.

A If the documents, you see, provided as I think they do that collateral shall also secure future advances, then the additional $1,500,000 would be secured by the same collateral as existed --

Q I agree with you, Mr. Radom. Let me ask you this: Did you not just say that even as to the first $1,200,000, it was, at least in your opinion, a fact that the Fund was undercollateralized.

A I don't profess to be an expert in that area, but I merely made the statement that if this operation were closed down and the machinery and equipment offered for sale under the hammer, the Fund was exposed to a very substantial loss. This is one of the reasons which prompted me to urge the trustees to give this proposal, providing monies to the debtor in possession to carry on operations, favorable consideration.

Q Mr. Radom, holding on to that thought for a moment: I'll agree with you that any additional monies that would then be put in by the Fund would come under the collateral, but if in fact the Fund was already undercollateralized will you not agree with me that for all intents and purposes any additional money then put in by the Fund would be the same as the money of general unsecured creditors?

MR. SCHWARTZ: If your Honor please, I don't think that the witness is either competent to testify to this as a financial expert or that it is necessarily so. It depends on many factors.

I don't know if a hypothetical question of that type can be answered. Certainly it has nothing to do with this case.

MR. KNIGIN: Let me withdraw the question, your Honor, and put it another way.

THE COURT: All right.

Q Mr. Radom, the Fund was owed by Neisco prior to the Eleven proceeding $1,200,000; is that correct?

A I thought it was closer to $1,500,000.

Q A million and a half?

A A million six.

Q I think you have testified that although it was asecured debtor, it was really undercollateralized for the loans; is that correct?

A That was my belief. What I heard. But I again don't know precisely --

Q You made that point. If the Fund was to lend more money to Neisco they would be even further undercollateralized; do you not agree?

A Not necessarily.

Q They might become better collateralized by lending more money?

A Yes, sir.

MR. SCHWARTZ: Your Honor, this is purely argumentative. It has no probative value.

MR. KNIGIN: I will tie the probative value immediately. It won't take more than three questions.

THE COURT: The case seems to me to turn upon several rather narrow contested issues. I fail to see the relevancy of this dialogue.

MR. KNIGIN: Permit me, your Honor.

THE COURT: I will give you a little more leeway.

Q Is it not a fact, Mr. Radom, that by the Neisco going into Chapter Eleven the Fund was able to loan an additional $1,600,000 with the protection of the court that would allow that $1,600,000 to be secured by the court and by the first monies to come out of Neisco?

A The same thing could have been accomplished outside of the Bankruptcy Court.

Q Could be accomplished?

A Yes.

Q You mean you could do something rather comparable as a certificate of indebtedness?

A Certainly.

Q Could you tell me what you could do?

Q You already -- we already had our documentation, if my recollection serves me correctly. The documents did provide for future advances.

Q So what you are saying to me then, is it your opinion as an expert in the field of bankruptcy, that in this case the Fund would have been as well off under the secured interest which it had as it would be in Chapter Eleven under a certificate of indebtedness?

A No, sir, not because of the reason you give.

Q What is the reason?

A We had a personality or two involved in this case in whom the trustees had no confidence and believed that they were perpetrating great frauds upon the Pension Fund. Therefore, to control them, which we were unable to do absent a court supervised reorganization, we had to resort, if we were to make any funds available,to Neisco.

This was illustrated best of all by what happened to Montmartre. We worked out an arrangement with Mr. Ballon --

Q I think you are getting a little afield, Mr. Radom.

A You opened it.

MR. SCHWARTZ: The witness ought to be permitted to finish his answer, your Honor. It was a complicated question.

THE COURT: Go ahead, Mr. Radom.

THE WITNESS: Mr. Ballon prevailed upon us to dismiss the proceeding, the foreclosure proceeding in Florida, and assured us that we would have the ability to countersign all checks.

Unilaterally, Mr. Horvath terminated that after two or three months and it was rather apparent that it was just as well we went into court proceeding with Neisco.

At least we had the benefit of being able to control him through the court proceeding. We had a countersignatory, and we also would have the ability through the assistance of the court to terminate his employment, which was done.

Q Now, Mr. Radom, would you say that it was an important thing to the Fund, an important item that they have the court supervision of what was done with the proceeds of Neisco?

A I think the trustees would have been imprudent had they not -- had they not sought to seek some additional protection except that which Horvath was able to give them.

THE COURT: Mr. Knigin, if the thrust of this line of questioning is to demonstrate that the Fund, for reasons of its own, wanted to have a Chapter Eleven proceeding instituted here, I understand that.

MR. KNIGIN: Well, your Honor, then you understand something that I understand, but that the witness stated right from the witness stand earlier today that it was -- that the request for the Chapter Eleven was not made by the Fund, that they didn't care about a Chapter Eleven, and that it was Mr. Polish who threatened the Chapter Eleven very, very early on in the proceeding.

That was the reason for the whole line of questioning, your Honor.

MR. SCHWARTZ: I don't think that was the thrust of the witness' testimony.

MR. KNIGIN: I have my notes right here that said, "Polish advised the Fund that Neisco would file a Chapter Eleven petition. Request not made by the Fund who thought -- request not made by the Fund."

THE COURT: It is crystal clear to me on this record that the Fund preferred a Chapter Eleven proceeding.

THE WITNESS: No question about it.

THE COURT: I didn't think there was.

MR. KNIGIN: I have no further questions of the witness, your Honor.

THE COURT: Redirect.

REDIRECT EXAMINATION BY
MR. SCHWARTZ:

Q Mr. Knigin was reading from the minutes of the trustees of June 11th, 1970, and he stopped at a given point. I would like to read the rest of that so your Honor will have that in context.

THE COURT: What date is that, Mr. Schwartz?

MR. SCHWARTZ: The minutes of June 11th, 1970, Exhibit J attached to the response to the interrogatories. which has been marked Exhibit F in evidence.

At the point that Mr. Knigin stopped.

"Mr. Harris:" He is one of the local counsel for the Fund. "In the absence of Joe Radom and Harvey Silitz, the course of action isn't definitive at the moment with respect to Neisco and Montmartre, and they suggest that the trustees adopt the following resolution. Resolved: That all phases of this matter be referred to our legal counsel with instructions to proceed as they deem advisable for the protection of the interest of the Pension Fund, including, if necessary, foreclosure action.

"Chariman Sheetz: What is your pleasure?

Motion made, seconded and carried to adopt the above resolution.

"Chairman Sheetz: It is so ordered."

Q The resolution adopted in 1970 authorizing foreclosure didn't contain any mandatory direction to proceed forthwith, did it?

A It was not my understanding that it did, no.

Q Notwithstanding the authority that was voted by the trustees, you, with their approval attempted as far as you could to work out some sort of a mutually acceptable arrangement?

A As Counsel for the plaintiff indicated, it was a formidable action to be taken, a rather drastic one, and therefore, we were embarked upon an effort to be more constructive than that if at all possible.

THE COURT: Is it fair to say, Mr. Radom, that a"loaded pistol"had been placed in counsel's hand, but it had not yet been fired but was smoking, is that it?

MR. SCHWARTZ: Counsel read from this document and stopped at page 53, line 14 "Mr. Radom.

I would like to continue that with the referee's remarks. Page 53, line 15.

MR. KNIGIN: What date?

MR. SCHWARTZ: February 1, 1972.

MR. KNIGIN: Thank you.

MR. SCHWARTZ: "The Referee: It is a question of whether or not the funds will come from the debtor. Assuming the Court fixes such allowances that it deems fair and reasonable, based upon whatever the relevant criteria or the Court's judgement should show, those funds theoretically come from the debtor, the company who seeks revival. If it can't meet the amounts fixed by the Court the case fails of confirmation. Under the Brigateen Hotel case, decided by Judge Hand of the Second Circuit, whatever the Court fixes as reasonable must be drawn up by the debtor. It isnot a deterrent for the Court to fix a lesser sum merely because the debtor is having difficulty. I want to know before we go much further along in this case that we have an engagement for two years, that applications are made to the Court, and the Court fixes them. The funds come from the debtor, or any compensation willl come from outside third parties, presumably the Fund. I don't want to proceed all the way to confirmation and do all the things necessary for confirmation which at this point are myriad" It is misspelled here, "only to learn that after the Court fixes allowances that the debtor can't make it. I think you might want to consider that, that the cases re: Brigateen Hotel. If you want to come to my chambers and I will give you the citation or give it to you. That is something to be so considered that you may not have considered but ought to know.

"Mr. Itzler: May I ask if the Pension Fund --

"The Referee: I don't want to get involved in that. I am merely alerting the Fund of the possibility that if I fix compensation and the debtor has not got the funds to make it, I may adjudicate on that basis under that case, and I just want to alert you both to the power of the Court. If you want to file acceptances with the clerk?

"Mr. Itzler: Yes, sir.

"The Referee: File them tomorrow. I can adjourn this matter. I can't close the first meeting today, in any event."

Q Mr. Radom, do you act for the Fund as counsel in any matters today?

A No, sir.

Q When did you last act as counsel to the Fund in any matter?

A Approximately a year and a half ago.

Q Do you have any interest in the outcome of this case, financial interest?

A Not financial.

Q Do you have any understanding as to your compensation for testifying here today?

A No, sir. Except that I would hope to be able to submit a billing for my time spent here as well as being reimbursed for my travel expenses. But I have had no conversations with anyone --

THE COURT: Are you proceeding at your peril, sir?

THE WITNESS: I am, at my own risk.

Q Now, Mr. Knigin questioned you at great length at the beginning of your cross-examination about whether there would be anything to reveal under General Order 44 if there were no contract.

Now, can you explain your position on this matter so that we have it very clearly before the Court. In other words, assuming that there were a contract as alleged in the complaint, either an express contract to pay legal fees willy-nilly, or an express contract to fund the arrangement without limitation as to any conditions, would either of those contracts alleged in the complaint require disclosure under General Order 44, in your opinion?

A There is just no question in my mind about it.

Q Now, if neither of those contracts did not exist, would there be any basis for a contractual in this case?

MR. KNIGIN: You Honor, shall I object to that question?

THE COURT: Oh, yes, I think that is the ultimate question for the Court, Mr. Schwartz.

Q Assuming that neither of those contracts did exist, would the known disclosure of that be what has been characterized in your cross-examination as a secret agreement?

A I have testified to that fact. If in fact there was an understanding as outlined by Mr. Ballon, it required disclosure. Failure to disclose results in a concealment and a concealment is contrary to General Rule 44.

Q There was a lot of cross-examination on the question of the understanding with the Bankruptcy Court as to the payment of administration expenses. Will you tell us, first, in generalities what is the usual procedure in a Chapter Eleven proceeding with regard to the payment of attorney's fees and administration expenses?

A Depending upon who you represent, and if you are counsel for the debtor filing a voluntary Chapter Eleven petition, and recognizing the uncertainities which prevail because of the fatality rate being so great in Chapter Eleven matters, the attorney for the debtor will invariably seek to obtain a retainer at the inception. In the event that the plan is finally formulated and confirmed by the Court, then the debtor, debtor's counsel would be entitled to compensation.

In the past there is always some question whether or not counsel for the debtor in an aborted Chapter proceeding could still be entitled to compensation because the original case law was to the effect that unless there was a substantial contribution to a successful plan, counsel for the debtor could not be compensated. However, that has been changed under the new court rules, or bankruptcy rules, which now permits the Court, at its discretion, to evaluate contributions made by counsel for the debtor.

We have, in addition to counsel for the debtor, we have counsel for the creditors committee, we have counsel for the trustee, counsel for the receiver. It depends upon the jurisdiction in which you are practicing. But invariably one is unable to evaluate one's contribution, what one should receive by way of fees, until one determines how much time is required, the complexity of the issues presented, and whether or not there are any funds available for payment.

Certainly in this case the debtor had no monies. Mr. Ballon and Mr. Itzler were well aware of that from the very inception of the proceeding, and they did arrange, apparently, to obtain $25,000 through Montmartre, which wasn't disclosed to me, very frankly, until after the first of January, 1970, not at the meeting in Chicago -- it was only called to my attention, very frankly, when our countersignature at the Montmartre refused to countersign one of Mr. Ballon's checks. He called me on the phone and explained very bitterly and also wrote to me, and that was the first time that I learned that he and the accountant had made arrangements to seek their retainers through the device of Montmartre.

THE COURT: It was not discussed at all in the early November, 1969 meeting in Chicago?

THE WITNESS: No, sir.

Q Ordinarily when a plan fails at confirmation, does the attorney for the debtor have any claim for fees except out of the estate, if any?

A Unless he has a third-party contract, and as these gentlemen have testified, there are rare occasions when that occurs, I may say very rare, but if there is, I presume, if they can establish the contract they should be compensated. But if there are no monies in the estate-- I used the expression earlier that a bankruptcy practioner can spend a great deal of time at his own peril, but he does so with his eyes wide open, because the same practice has been going on now from the very day I started -- commenced practicing, forty-nine years ago.

Q Was there any time any statement by you in the course of the bankruptcy hearings in which you represented to the Bankruptcy Court that the Fund would underwrite the expenses apart from the confirmation of an ultimate plan that was satisfactory to the Fund?

A The answer basically is no except Mr. Knigin did call my attention to a colloquy which occurred in Bankruptcy Court where I assured the Court that $10,000 would be depositied.

If I can just backtrack on that. In the spring or summer of 1970 counsel for the creditors committee attempted to prevail upon me to seek $50,000 to deposit with the court, or with the committee, so that there would be some fund available to pay administration costs and fees in the event a plan failed for confirmation. He made this request in open court. We rejected it.

I recall the $10,000 discussion because I felt, very frankly, some obligation to pick up some of the court costs since we had prevailed upon the Court to bear with us while we attempted to work out our deal with the Horvaths, while we attempted to negotiate with the government and other parties. But that was the extent of the Fund's commitment. Absent a final and firm plan of reorganization or arrangement, rather.

Q Mr. Knigin cross-examined you about the question of whether there was any attempt to sell any company other than Neisco. Was there an attempt by the

Fund to buy any assets -- the trustee's right titles and interest in the assets of Masmo?

A Yes.

Q What happened with that?

Q We were outbid by Mr. Horvath's -- one of Mr. Horvath's companies.

Q What happened with the Montmartre Hotel?

A Foreclosure proceedings were initiated and ultimately the matter was compromised after the -- after a full-fledged trial in Miami, and substantial sums were paid to by Horvath's peace. The Montmartre was then turned over to the trustees of the Pension Fund.

Q So that he's out of that completely now?

A I don't know. I have had no contact of any kind in recent months.

Q You were asked about Mr. Rugendorf and Mr. Eisenrod. Are either one of those gentlemen employees of the Fund?

A Well --

Q In the sense of being on their payroll, withholding and that sort of thing?

A Mr. Eisenrod was not compensated by the Pension Fund. Mr. Rugendorf , however, was. I have heard your cross-examination as to whether or not he was an independent contractor or employee or otherwise. As a lawyer, I must say that since we did have some control over his activities, that even though he was not subject to payroll deductions, I do believe in all candor that, within the common-law definition of master-servant, that he might very well be construed as being an employee.

MR. SCHWARTZ: Thank you all, Mr. Radom.

RECROSS EXAMINATION BY

MR. KNIGIN:

Q I have just two questions, Mr. Radom.

Mr. Radom, you said a few minutes ago that $10,000 which you were putting up was for the Court costs. Do I understand it then that you agreed that the Court does not operate at its own peril, only the attorneys do?

A I didn't make that distinction at all.

Q I see. Is there a difference between the Court costs and the attorney's fees?

A No, I think when we speak about administration costs and fees, you are talking of Referee salary and expense fund, you are talking about applications for compensation, stenographer's fees and so forth.

Q They are all part of the administration expenses, aren't they?

A They are.

Q And they are all part of this whole package we call administrative expenses?

A But, I want to emphasize, no part of it is allocated to Ballon, et al, or any other lawyer -- or to any creditor group.

Q In point of fact, when the Ballon, Stoll & Itzler firm had their first peril, that is the peril of not being able to receive the $25,000 from Montrmartre because the countersignatory placed there by the Fund refused to issue the checks, who interceded on behalf of Ballon, Stoll & Itzler?

A I did.

Q You arranged for the payment, didn't you?

A I did.

Q Is there any question in your mind, Mr. Radom, as you sit here today, that if the Pension Fund had funded the plan the Chapter Eleven would have been confirmed?

A Oh, I presume that is a correct statement, assuming however, that we were willing to proceed, but we weren't.

Q But if you had it would have been confirmed?

A You are only speculating.

MR. SCHWARTZ: That is an assumption that is not involved in this case. It is a hypothetical question which didn't happen.

THE COURT: I don't know whether it is too hypothetical or not, Mr. Schwartz.

The question, as I understand it, is if -- in Mr. Radom's opinion, if the Fund had not pulled the plug, so to speak, and declined to fund the arrangement, would the arrangement have gone through.

I simply don't know if that is too hypothetical or not. If it is I'm sure that Mr. Radom can protect himself with his answer. But I think the question itself is admissible, or is proper.

A You must understand that the plan itself was not satisfactory to the -- the plan itself was not acceptable at that moment to the trustees, and therefore they were not going to provide the funds.

Q I understand that. I think that there were a lot of reasons given, one being that somebody had been indicted and things like that. Would you tell all the reasons without the whole history, is there any question in your mind that if they had funded it, that it would have been confirmed?

MR. SCHWARTZ: If your Honor please, I must object to that question again because unless they have an obligation to fund it there is no basis for this. It is like saying, if Mr. Rockefeller would give him $100,000, he would give him $100,000, of course.

THE COURT: I understand that perfectly well, Mr. Schwartz, and in permitting the question I am not at all deciding or indicating that the Fund was under such an obligation or that its motive in declining to do so is material. But there has been a good deal of evidence on questions of causation here, and this question goes to that.

If Mr. Radom can answer the question, I will permit him to do so.

A If you are assuming that all other collateral matters were resolved satisfactorily, of course they weren't, but just isolate them if you want to by way of hypothesis solely, the answer is yes, in my judgement there was no other impediment as far as Neisco was concerned, except this, you may as well get this, it is unfortunate that it is so late -- I could never quite resolve the question as to how to carve Neisco out of this complex, and that was never finalized. Even though I say that all other ingredients in the program -- the government finally acquiesced after almost two years of negotiations, we finally reached a tentative understanding with Horvath and the creditors, we still had not really answered this one issue, which to this date I still don't know the answer to.

Q But given the facts that I suggest, --

A If you want to speculate, the answer is yes.

MR. KNIGIN: Thank you. No further questions.

THE COURT: Mr. Radom, let me go back for a moment to General Order 44. I will need your further guidance on that subject.

Let's assume for the sake of argument that attorneys who are applying to be appointed as counsel for the debtor in possession have failed in their obligation to make a full disclosure of connections with creditors, and having failed to make that disclosure, they are appointed and thereafter the connection which they had not disclosed comes to light, so that we have, assuming for the sake of this discussion, a transgression of General Rule 44, which is later perceived. What are the sanctions or the consequences of that transaction, what happens to an attorney for a debtor in possession in such a situation?

THE WITNESS: In this particular situation he should be deprived completely of his compensation.

THE COURT: Well, deprived of his compensation by whom?

THE WITNESS: The compensation that he would have received,a) from the -- through Neisco, the Bankruptcy Court because the attorneys have not disclosed, and the second aspect of it is, if there was a contractual relationship established between the Pension Fund Trustees and the plaintiffs, does that -- would that follow that they were barred from asserting their claims against the Pension Fund Trustees?

I think the answer to the latter question, if that is your question, is in my judgement, the endorsement of a contract of that kind is contrary to public policy and should not be recognized.

THE COURT: I perceive that to be a question of law which I may have to pass judgment on myself in this case, but --

THE WITNESS: I'm sorry if I haven't answered your question.

THE COURT: Within the context of Rule 44 itself, is it not the fact that the consequence of a failure to disclose, as required by Rule 44, is to put the attorney into a position where he can not expect his application to be approved by the bankruptcy judge?

THE WITNESS: That is what the rule says.

THE COURT: The General Rule 44, in other words, addresses itself to what the attorney can expect to receive from the Bankruptcy Court?

THE WITNESS: Right.

THE COURT: The obligation of disclosure is one that he owes to the Bankruptcy Court and the sanctions for nondisclosure, I take it, under the rule, would be applied by the Bankruptcy Court?

THE WITNESS: Correct. Depending upon, again, the -- whether or not it was an oversight, deliberate or otherwise.

THE COURT: That is something that the bankruptcy judge would have to take into consideration, within the context of whether or not to approve an application for fee or allowance made to the bankruptcy judge; is that right?

THE WITNESS: That's right. I want to make it abundantly clear, I don't think it was in the affidavit because there was no agreement.

THE COURT: We have talked about disclosure or nondisclosure, and secret matters. If I accept the plaintiffs' evidence in respect of a fee agreement with the Fund, does it not follow that while that agreement may not be disclosed to the bankruptcy judge, there was no need to disclose it to the Fund because the Fund already knew about it; isn't that so? Assuming that there is such an agreement?

THE WITNESS: Right.

THE COURT: On that assumption, the deal or agreement, while it could be characterized as secret vis-a-vis the Bankruptcy Judge, could not very well be secret vis-a-vis the Fund?

THE WITNESS: That's right.

THE COURT: Now --

THE WITNESS: You should also bear this in mind though, we are dealing with a very unusual entity in that we are dealing with a pension fund, which are actually trust funds, and if the fiduciaries have made any improper comitment, unless it can be demonstrated, a) that it was within the scope of their authority to properly authorize it -- again, I say with all candor, I cannot envision the trustees squandering the monies that have been ascribed to them in this case. In other words, it is just impossible in a matter of two hours to have a Mr. Ballon come into Chicago and say,"I want $100,000 for handling thiscase," and have them acquiesce to it. Contrary to what he said, it was not a protracted meeting, it didn't last seven or eight hours, it lasted about two, two-and-a-half hours. They got right to the meat of it.

THE COURT: All right. According to my notes, at that meeting in Chicago in November, early November of 1969, which you attended; is that correct--

THE WITNESS: Right.

THE COURT: According to my notes, Mr. Ballon testified that Mr. Matheson, a trustee, was present and asked Mr. Ballon what would be needed in addition to 1.2 million dollars to finance a Chapter Eleven arrangement; that Mr. Ballon responded with estimates in respect of how many cents on the dollar would be needed to pay off unsecured creditors; that he also addressed the question of the I.R.S. claim, as he then understood it, and after reciting some of these figures, Mr. Ballon said that he also said at this meeting that his firm would file a Chapter Eleven proceeding only if it was paid a retaining fee of $25,000.

Is it your testimony that nothing was said at this meeting about a retaining fee of $25,000?

THE WITNESS: That's right, nothing was said.

THE COURT: All right. According to my notes, Mr. Ballon then testified further that after Mr.

Ballon referred to his retaining fee of $25,000, Mr. Matheson then said, "What would the total fee be?" And Mr. Ballon replied that it was hard to say, that he would have to apply to the referee, but that if the Fund could pay the Ballon firm through third parties it would require an additional $75,000.

Is that your testimony that at this meeting no such conversation as that took place?

THE WITNESS: No such conversation like that took place.

THE COURT: Were you in the conference room throughout the entire period of the meeting?

THE WITNESS: The entire period. If I may further volunteer, Mr. Matheson didn't take active part in this meeting.

THE COURT: Mr. Ballon testified further that at the conclusion of the meeting he was told by those who were representing the Fund to proceed to draft the Chapter Eleven papers.

Did he receive such instructions at that time from the Fund representatives?

THE WITNESS: We could not give him those instructions. We encouraged him to proceed because the funding itself, that is, when I speak of funding, I'm talking about the funds needed to carry out current operations, required trustee approval, which would not be forthcoming that afternoon. During the interim period, we indicated to him that the only basis upon which the trustees would consider advancing anymore money to Neisco would be after the Chapter Eleven petition was filed.

THE COURT: Thank you all. I have --

RECROSS EXAMINATION BY

MR. KNIGIN:

Q Mr. Radom, notwithstanding the fact that Mr. Ballon never discussed the $25,000 retainer in Chicago, or his $100,000 retainer overall, are you stating that notwithstanding that he didn't do that, you were instrumental in arranging for the payment to him of the $25,000 by Montmartre?

A No.

Q Didn't you intercede with the countersignatory and tell him and direct him to pay it?

A I did that. Which is somewhat inconsistent with the -- with your prior statement.

Q Okay. To the extent that it is inconsistent I will accept that.

By the way, I think you further testified that you don't remember a second meeting, I think it was the

19th of November, about fourteen days after the first one in Chicago; is that correct?

A I have no independent recollection of it.

Q That means that there is a possibility that you weren't there?

A It is possible. Or I might have been there, and frankly, I just can't -- I have no independent recollection of having been there or participated.

Q By the way, inbetween the two meetings, if there had been a second meeting, was not there a meeting with you and Mr. Teitlebaum on the 11th of November

A I have no independent recollection, but there might have been.

Q Let me see if I can refresh it slightly:Do you remember the preparation of an agreement in connection with the Montmartre proceeding you needed right away, which you wanted to have sent down to Florida to the attorneys down there?

A I cannot -- I recall what you are suggesting to me, but I cannot fix the time period.

Q Well, Mr. Ballon has testified that that meeting took place in New York on the 11th of November.

A Not according to what I recall. I heard his testimony and he may have said that, but I have no idea of having been here.

Q Do you recall that meeting?

A I don't recall a November 11th meeting in New York. I do recall that we had a conversation early in the proceeding about Montmartre and the necessity of trying to resolve that problem.

Q In all the time that you were saying, Mr. Radom, in court that the Fund would fund the plan, including the administration expense, is it your testimony you had no idea how much it was that Mr. Ballon wanted?

A You must understand this, sir, that after all of the years of practice, there are certain built-in safeguards. If an attorney of their stature devotes time and effort to a successful program, they should be compensated.

They or ourselves may disagree as to the reasonableness of the services, and I disagree with the $100,000 figure they thrust at us, but we had sufficient confidence in bankruptcy Judge Babbitt, that notwithstanding their excessive demands we would be treated fairly, and that was it.

Q Let me --

A I learned --

Q I'm sorry.

A It was until we were ready to have the program confirmed and summarize the hours spent and results accomplished, everything respecting fees was premature.

Q You just used a phrase, and let me see if I can get it exactly, you said that you had confidence in Referee Babbitt that notwithstanding Mr. Ballon's excessive demands, that it would be worked out. What excessive demands?

A I had a conference with Mr. Itzler, accompanied by Mr. Vogel, where I asked him in the latter part of August --

Q Of '71?

A '72.

Q '72?

A I'm sorry, '71.

Q That was two years later?

A Two years later.

Q Did you have any feeling about the referee's protecting you from Mr. Ballon's excessive demands in '70?

A I always -- after having once met Judge Babbitt, I also had a great deal of comfort in appearing before him.

Q And so you were secure in 1970 that he would protect you from Mr. Ballon's excessive demands?

A If they were excessive. I didn't have any idea what they were.

Q At that time you didn't know if they were excessive?

A Obviously, until we knew, the case was one at its end, and all other matters had been resolved, then we could sit down and discuss adequate compensation.

Q Presuming the accuracy of everything that you have said, at any time between November, 1969, and August of 1971, did you ever make an inquiry as to what Mr. Ballon's fees would be?

A No, sir.

Q Did Mr. Eisenrod?

A I don't know.

Q Did Mr. Rugendorf?

A I don't know.

Q Did Mr. Teitlebaum?

A Anticipating your questions, I don't know that anybody asked what their fees were going to be. I was in charge of the proceeding, from the standpoint of the arrangement, and I assume that if they intended to inquire or had received a response, I would have been alerted. I have received no information or communication from anybody indicating any conference of that kind.

Q Based upon your experience as a bankruptcy lawyer, you knew that there would come a time when Ballon, Stoll & Itzler would ask for a fee, didn't you?

A If a successful plan --

Q You said that. You knew they would come and ask for a fee?

A Only predicated upon a successful culmination of proceedings.

Q But you knew that if that occurred they would ask for a fee?

A Certainly.

Q And everybody was striving towards a successful confirmation?

A Correct.

Q And you knew that the Fund was going to have to ultimately produce the dollars to pay that fee?

A The Fund was the sole source of the monies needed to make a required deposit, but the program had to be satisfactory to the Fund.

Q Correct. Not withstanding, at any time were you at least curious as to how much Mr. Ballon's fee would be?

A Oh, I have ideas, and I am able to develop as a result of my thirty odd years experience in the bankruptcy practice.

Q So you had some idea?

A I had some ideas, and I also believe that we were dealing with fair people.

Q I think you testified that you didn't know initially about the arrangement with Montmartre to pay the initial retaining fee of $25,000?

A That is my testimony.

Q Is that correct?

A That is my testimony.

Q. And then I think you said you were pretty surprised to find out about that?

A Well, not surprised, but -- I don't think I used the word "surprised" there have been a lot of transactions in the Montmartre which were called to my attention, and I wasn't surprised, no.

Q You just testified, unless I missed it somewhere, that when Mr. Ballon was out in Chicago in November he never mentioned the $25,000?

A That is my testimony.

Q On January the 23rd, 1970, only about six days later, you were already getting a letter from him asking you to get him $25,000, or the $5,000 payments; is that correct?

A That's correct.

Q So to that extent you were surprised?

A The word is not surprised, sir. I was not surprised at that moment, no.

Q You weren't?

A No. I testified earlier, Mr. Knigin, that I did learn about it after the first of the year.

Q After the first of the year?

A Or thereabouts.

Q And did you think that that demand by Mr. Ballon was excessive?

A $25,000?

Q Yes.

A I didn't think so.

Q You didn't?

A No, I didn't.

Q You thought it was a fair fee?

A Well, it was a sizeable complicated matter, and I was not one to assert myself and say it wasn't fair or unfair. He had a source of money and I wasn't about ready to impede his efforts to extract it.

Q By the way, at the time that Montmartre was paying this money they were a big debtor of the Fund, weren't they?

A That's right.

Q A lot of money they owed the Fund?

A That's right.

Q Okay. After you saw the size of Mr. Ballon's retainer of $25,000, did you ask him what the balance of his fee would be

A I repeat again, Mr, Knigin, I never discussed the amount of Mr. Ballon's fees with Mr. Ballon at any time.

Q Based upon your thirty-seven years experience as a bankruptcy lawyer, considering a Chapter Eleven such as the Neisco case, and presuming the safeguards that you have added about confirmation, would you consider not that a case in which a lawyer receives a $25,000 retainer fee, which you indicated was not excessive, do you consider that a total fee at the end of the case of $100,000 is excessive?

A It could be.

Q Is it in this case?

A I haven't any idea what their time records show. I know what results they accomplished, which were rather negative.

Q Negative in the sense that there was no confirmation?

A That's right. They didn't make any material contribution to any program. They tried, I don't fault them for that. Mr. Itzler tried desperately, and argued, tried to prevail upon us, but the results weren't there.

Q Presuming that there had been a compensation, Mr. Radom, just for the moment, what would your fee in a matter of this kind be?

MR. SCHWARTZ: I object to that.

THE COURT: Sustained.

Q Mr. Radom, do you consider the sum of $100,000 as a total fee in this case for the Ballon firm excessive, if there had been a confirmation?

MR. SCHWARTZ: I object to the question, your Honor. There is absolutely no basis for the witness to state what a reasonable fee would have been in this case.

THE COURT: Also, aren't we verging on the subject of quantum?

We are going to reserve that question,Mr. Knigin.

MR. KNIGIN: I have no further questions. Thank you.

MR. SCHWARTZ: I have one.

REDIRECT EXAMINATION

BY MR. SCHWARTZ:

Q In connection with this $25,000 retaining fee from Montmartre, was a very large part of the discussions through this entire period devoted to the Montmartre Hotel?

A They were.

Q Was it perfectly in order for Montmartre to pay a retaining fee to the plaintiffs for representing Montmartre and the Horvath interests in that respect, quite apart from Neisco?

A I would not pass judgment upon that.

MR. KNIGIN: Just one question.

RECROSS EXAMINATION

BY MR. KNIGIN:

Q Mr. Radom, is it not the testimony of everybody involved here that the $25,000 was paid to Ballon, Stoll & Itzler for the Neisco matter and is so indicated in the official schedules filed in this case?

A That is what they said. But that is what they said. Whether it is proper remains for another court to determine. I'm not passing judgment.

Q But you directed the payment of that money, didn't you?

A I didn't oppose it.

THE COURT: All right, Mr. Radom, you may be excused.

(Witness excused.)

MR. KNIGIN: I would say that subject to whatever these minutes will indicate, which are being submitted to your Honor, as the lend credibility of the prima facie case that has been presented by the plaintiff, the plaintiff would rest.

THE COURT: Mr. Schwartz, how do you wish to proceed? I have thirteen minutes left today.

MR. SCHWARTZ: I think I can sum up the case in thirteen minutes. I would like refresh my motion to the submission of briefs, since we are both submitting additional material in the form of excerpts from the bankruptcy hearings and from the depositions.

THE COURT: You are reserving your motions to dismiss?

MR. SCHWARTZ: Yes.

THE COURT: You may certainly reserve those motions, and I will reserve decision on them.

MR. SCHWARTZ: Thank you. On the defendants case of course we had Mr. Radom's testimony, may I ask counsel to produce the depositions of Mr. Matheson and Mr. Duffey?

MR. KNIGIN: We are going to submit them

as part of the record. We have a copy of each and I would like to call the Court's attention that because we had only one copy of each supplied to us by the defendants, we had marked these for reading. I don't want the Court to be directed towards things specifically because of the fact we marked them, but I feel that I would be very happy to put them in.

MR. SCHWARTZ: You sent us copies for signature. We had them signed and they were sent back to to you so you should have two copies. If you don't have ribbon copy then with the Court's permission I will xerox our copy, which is not marked up, and submit that as the deposition.

THE COURT: Mr. Knigin, tell me, and perhaps it is just as well to have it on the record, what additional material is the plaintiff submitting as part of its prima facie case?

MR. KNIGIN: The plaintiff will submit the depositions of both Mr. Duffey and Mr. Matheson.

We will submit several excerpts from the court proceedings before Referee Babbitt on that question of disclosure to the Court. I don't know that it will be necessary to submit the portions that have already been read into the record because I think they speak for themselves upon the record.

THE COURT: Very well. That is what the plaintiff is submitting. Now, Mr. Schwartz.

MR. SCHWARTZ: If we can assume that the depositions of Matheson and Duffey are in as part of the plaintiffs' case, then all I have to submit are excerpts, after I see the plaintiffs' excerpts, to respond to that.

THE COURT: All right.

MR. SCHWARTZ: That is about the defendants' case.

THE COURT: That is the defendants' case?

MR. SCHWARTZ: Yes.

THE COURT: Is there a rebuttal on behalf of the plaintiffs?

MR. KNIGIN: We had planned, your Honor, to produce a rebuttal witness. It is a little bit difficult in view of the fact that there hasn't been much by way of a defendants' case. The only purpose for the rebuttal witness, the only purose he would serve now would be as it goes to the heart of that question that Mr. Radom and Mr. Ballon seem to have some differences of recollection upon, and that was whether or not there was a discussion in Chicago in November of 1969 about fees to the firm of Ballon, Stoll & Itzler.

That would be the only purpose for producing Mr. Polish, and -- whatever the Court's pleasure is in providing time for that to take place.

THE COURT: I have no pleasure or displeasure. I left entirely to counsel to put in whatever evidence you want to put in on any issue.

MR. KNIGIN: Then I would say, your Honor, if you would permit us, ten o'clock tomorrow morning we can put Mr. Polish on and I think dispose of him in very short order.

THE COURT: Very well.

We will then adjourn until ten o'clock tomorrow morning for the purpose of receiving evidence in rebuttal by the plaintiffs, which I understand will consist of testimony from Mr. Polish.

MR. KNIGIN: By the way, your Honor, Mr. Ballon was located in our files, although they are not ribbon copies, they are nonetheless exact carbon copies of the examinations of Mr. Matheson and Mr. Duffey, and we will offer them now so that there will be no question that they be in evidence.

THE COURT: They may be received.

(Plaintiffs' Exhibit 23 received in evidence)

(Plaintiffs; Exhibit 24 marked for identification and received in evidence by the Court.

THE COURT: We stand adjourned until ten o'clock.

(Court adjourned.)

I (We) hereby certify that the foregoing is a true and accurate transcript, to the bes of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Official Court Reporter
U. S. District Court

J.Haight

bs:mg 1

Ballon, Stoll & Itzler

v. 72 Civ. 2916

Thomas J. Duffey, et al.

September 28, 1976
10:40 a.m.

(Trial resumed)

THE COURT: Let's proceed, Mr. Knigin.

MR. KNIGIN: Mr. Jack Polish.

JACK POLISH, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KNIGIN:

Q Mr. Polish, are you an attorney?

A Yes.

Q How long have you been practicing?

A About twenty-one years.

Q Did you have occasion to represent a Mr. George Horvath in recent years?

A Yes.

Q And some of his companies?

A Yes.

Q Would that include Masmo, Mt. Clemens, Neisco, Craftspun, companies of that type?

A Yes.

Q The Montmartre?

A Yes.

Q Do you still represent them, by the way?

A Yes.

Q Now, Mr. Polish, I'm going to ask you to direct your attention to a specific incident in 1969.

Do you recall traveling to Chicago, November 5, 1969, with Mr. Fred Ballon?

A Yes.

Q Tell us the reason for that trip and what occurred when you arrived at that destination?

A Neisco had been a borrower from the Central States Southeast and Southwest Areas Pension Fund.

They were experiencing tremendous financial difficulties and we were going to see -- we were going for a meeting with representatives of the pension fund to discuss additional financing for Neisco.

Q Who was present there in Chicago when you arrived?

A I believe Mr. Dorfman, who at that time was a special consultant to the fund, Mr. Radom, Mr. Teitlebaum, Mr. Matheson, I think Mr. Baron, maybe a Mr. Duffey -- I think several trustees may have been there.

It was a large group of people.

Q Were they all assembled in one room?

A Yes, we were in a huge office that belonged to Mr. Dorfman. He had a very large conference table off to one side of the room. We were all pretty much sitting around the conference table.

Q Did a meeting take place?

A Pardon?

Q Did a conference take place between you?

A Yes.

Q By the way, who was there besides you, if anybody?

A Mr. Horvath and Mr. Ballon. I don't think anybody else was with us on the 5th.

Q How long did the conference go on for?

A I think two, three hours.

Q Do you know whether or not you were constantly in one room?

A I remember Mr. Dorfman going in and out. I know Mr. Horvath got up occasionally. I think he went out with Mr. Ballon from time to time. I sometimes went out. Sometimes the meeting continued in session -- most of the time the meeting was in session but periodically there would be interruptions.

Q Could you tell us generally what was the nature of the discussion between the members of the fund and your-- and the people representing Mr. Horvath? And if you could, identify who it was that was having or participating in the discussion.

THE COURT: Hold it just a minute.

The representatives of Neisco-Horvath team were yourself and Mr. Ballon?

THE WITNESS: And Mr. Horvath.

THE COURT: All right.

A I had been meeting with various representatives of the fund, Mr. Teitlebaum, over a protracted period regarding the financial problems of Neisco.

Mr. Horvath had been also meeting with various representatives of the fund, and at this meeting Mr. Radom was new. It was the first time that I had seen that assemblage there. There was a -- I believe there was a Mr. Weisser there, who was an accountant, a Mr. Becker who was an appraiser.

The suggestion came up that, yes, they would help us, but the way they would help us would be if we would file a petition in Chapter XI.

Q Whose idea was that, yours or theirs?

A It was their idea. I believe it came from Mr. Teitlebaum.

Q What was Mr. Horvath's reaction to that?

A Intensely negative.

Q Then what happened?

A I think it was difficult keeping Mr. Horvath in the room. There were conversations back and forth and somewhere in this meeting there was an exploration, I think, by -- how can I put it? Mr. Horvath didn't want to do it. We convinced him to go back in and hear them out, what they were suggesting doing, and I think Mr. Teitlebaum did most of the speaking.

They explained that they would finance the continued operation of Neisco. They insisted they wanted the company in Chapter XI because that way they could get some kind of court control over it,over what was happening.

Either Mr. Matheson or Mr. Teitlebaum asked Mr. Ballon what it would cost,what the procedures would be like in New York.

Mr. Radom, I think, at that point, was introduced as their expert on insolvencies, and discussion ensued.

Q Did Mr. Ballon give them any figures as to the funding of the plan?

A My recollection is that he did.

Q As part of that general discussion, did he discuss the fees that would be necessary for his firm -

MR. SCHWARTZ: If your Honor please, I think at this point counsel ought not to lead the witness.

THE COURT: That is leading, Mr. Knigin.

MR. KNIGIN: I'm trying to bring him to the crux of the case, your Honor, but I will be very happy to withdraw that question.

Q Was there any specific discussion by Mr. Ballon as to the general overall funding of the plan?

A Yes. It was in response to questions from the other side. I think the trustee type people were concerned about what would happen to creditors and whatnot, and Mr. Teitlebaum was concerned about what -- and I think Mr. Matheson was concerned about what the costs would be.

Q Did Mr. Ballon respond to Mr. Matheson's query?

A Yes, he did. I think there was -- my recollection is there was an estimate that it might be settled with the creditors for something like 15 cents on the dollar, which I recall was something like $75,000; that he indicated that the practice with the federal government on tax arrears would be to give the federal government at least the amount that-- of the initial dividend to creditors, and work out some kind of term payout for the balance.

He estimated that creditors committee attorney in this case might get as much as $25,000. He wanted a $25,000 retainer.

He was asked what he felt his ultimate fee would be.

He felt it probably would be around $100,000, and suggested that he would set that fee if they made an independent agreement with him.

Q Were any arrangements made concerning the method of paying Mr. Ballon the $25,000?

A The fund had-- at that point the Mt. Clemens Corp. group of companies had essentially two operating entities, both of whom had substantially all of their assets pledged to the pension fund.

The other asset was a hotel in Miami. And they agreed that of the hotel's moneys, some $25,000 in the form of notes could be delivered to Mr. Ballon.

Q Was Mr. Radom in the room when this agreement was made?

A I believe so.

Q Was that ultimately done, to your knowledge?

A The payment to Mr. Ballon of the $25,000?

Q Yes.

A Yes.

Q Now, did anybody in the room raise any objection concerning the payment- - the funding of the plan and the amounts that would be necessary for administration expenses, including Mr. Ballon's legal fee?

A To my recollection, no. They were very anxious, and this is both at the 5th and the other meeting, I believe, around the 19th, to convince us to file a plan, file a plan -- not a plan, go into a reorganization.

Q Were there any conditions as to under what circumstances the money or the funding would be made?

A Not to my recollection. It was an unusual situation. We had come there asking for something like a million, a million and a quarter, to provide adequate financing for Neisco.

They suggested that we meet with their accountant, Mr. Weisser, to develop what they feel would be an appropriate cash flow and they would provide it.

And I believe Mr. Weisser met us in New York mid-week -- within the next week, and he came back on the 19th with their judgment that we needed a million, six going into Chapter XI.

That is what they authorized-- they told us to authorize borrowing from the Court. They would provide, they indicated, the necessary funds.

Q You talk about a meeting in Chicago on November 19th. Who was present at that meeting on behalf of Mr. Horvath?

A Myself, Mr. Ballon, Mr.Horvath and I believe our controller was there, Mr. London.

Q Who was there on behalf of the trustees?

A My recollection is substantially similar people.

Q Was Mr. Radom there?

A Yes.

Q And the 19th, were -- what was the nature of the discussion then on the 19th?

A It was once again a convincing of Mr. Horvath to file a Chapter XI petition. He was stilldragging his feet. They were trying to convince him that this was the way to do it.

Q Was there any conversation or conference concerning the funding expense?

A I believe we went over the numbers again. This time with Mr. Weisser's cash flow projection.

Q Was the Ballon fee again discussed?

A I believe so.

Q Was there any objection to it?

A No objection.

Q Was any objection indicated?

A No, it was get it over with, get it filed before the company falls apart.

Q Was any instruction given to Mr. Ballon in your presence?

A They asked him to file-- I believe Mr. Horvath continued to object, and I don't think Mr. Horvath agreed to going ahead until a day or two later. They wanted Horvath to have his attorney, Mr. Ballon, prepare and file the papers.

Q On the 19th, was there any discussion about Mr. Ballon's fee being conditioned upon any event in the future?

A I think it was conditioned upon the filing of a Chapter XI.

Q Anything else?

A Not to my knowledge.

Q Was anything said about the payment only on confirmation of a plan?

A No.

Q What about the interrelation of the Horvath companies, was anything said about that?

A Not that I recall. These were two separate problems, the hotel stood on its own two feet, both in their view, and the textile operation was another story.

Q Was there any discussion about working out some contract for Ernest Horvath?

A Not then.

Q Was there any suggestion that there would have to be something done about Masmo before the fund could fund the plan?

A No, we were concerned about it. We were concerned about the viability of Masmo and the effect of filing a Chapter XI.

They said "No, don't worry about it. This is the way to do it. This is the way it will turn out best for you."

Q Was there any talk about something happening at Montmartre with the filing of the plan?

A No. But simultaneously they were in discussion about Montmartre, the situation of the loans to Montmartre.

Q Was there any discussion about working out any kind of a specific deal with the Internal Revenue Service as a condition of the approval of the plan?

A No.

MR. KNIGIN: You may inquire.

CROSS-EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Polish, you currently represent George Horvath, or, rather, Ernest Horvath in litigation against the pension fund in an action pending in this court, do you not?

A Yes.

Q And is that case known as Horvath v. Duffey and others, 73 Civil 1248?

A I don't know whether that is the caption. It is Horvath v. Duffey.

Q That is an action in which you claim that the trustees agreed-- let me read your complaint so I don't paraphrase.

In that complaint do you allege -- I am reading Paragraph 9th --

A I don't allege it.

Do I allege it or does Mr. Horvath allege it?

Q The plaintiff alleges. You were the attorney for the plaintiff, were you not?

A My firm is, yes.

Q Your firm at that time was Langer & Polish?

A Yes.

Q Is it still Langer & Polish?

A No.

Q "9th. Defendant trust, through its trustees and/or its representatives, offered on condition that Neisco file a petition for reorganization under Chapter XI, Bankruptcy Act, to provide the necessary working capital to Neisco for the purpose of continuing its business, including sufficient funds to cover the cost of the reorganization and payments to creditors."

Do yourecall that allegation?

A Yes.

Q Is that allegation based upon the testimony you have now given us about the conversations that took place in Chicago?

MR. KNIGIN: Objection as to the form of the question, your Honor.

I think the allegation speaks for itself and his testimony speaks for itself.

THE COURT: I will overrule the objection.

The question is whether the activities and discussions in Chicago that have been testified to underlie that allegation.

I will permit the answer.

A I would think so, yes.

Q This action was tried before Judge Bonsal in this court, was it not?

A It was a part of a trial there, yes.

Q The part that Juege Bonsal tried was the question of whether or not there was a contract.

A Would you define the contract you are referring to?

Q In your complaint in that action, do you allege, in addition to a first cause of action on contract, a second cause of action on fraud?

A I think so.

Q And you also allege a third cause of action based upon alleged malicious interference by Mr. Radom with the alleged contract between the fund and Ernest Horvath?

A Yes.

Q And you allege a fourth cause of action on quantum meruit?

A Yes.

Q Was that a trial confined to the issue of whether or not a contract existed between the fund and Ernest Horvath?

A Loosely, yes.

Q Did Judge Bonsal make a decision in that case?

A Yes.

Q And that is a decision dated June 10, 1976, which I show you a copy of now, is that right?

A Yes.

MR. SCHWARTZ: May I offer this, your Honor? This was the same decision that we mentioned last week. I have already given counsel a copy.

MR. KNIGIN: Your Honor, for the reasons that I have previously indicated upon the record, I don't know what the relevancy of Judge Bonsal's decision is.

What is worse, we don't even have the capacity to cross-examine to even determine what the basis of that decision was.

We have no way of looking behind the decision as to what the fact situation was.

Your Honor, in the interim, since it was first offered by counsel, when I indicated I thought it was irrelevant then, and certainly was not binding upon this Court, in the interim I have had an opportunity to read it, because he has funished me with a copy yesterday, and in reading it, your Honor, I notice that the facts developed in that case are totally at variance with the facts developed in this case.

I think it is somewhat an encumbrance for us to try to compute or to figure why that decision was reached by Judge Bonsal, which seems to be totally in variance to the fact situation reached here.

I have to believe that somewhere along the line different facts were adduced, different evidence was presented, and at best it may have been done in a different way.

I think, your Honor, that under the circumstances it is improper to encumber this record with a decision of another judge in a case that has some relation in facts but certainly is not the case that is at bar.

THE COURT: Are you going to base some argument in the nature of collateral estoppel on some decision, Mr. Schwartz?

MR. SCHWARTZ: No, your Honor. I am using this only to test the witness' testimony with regard to the conversations in Chicago and the alleged contract, which is the same contract that he now testifies to that he testified to in the Horvath case, and I want to cross-examine him in relation to Judge Bonsal's decision.

I don't claim any collateral estoppel or any res judicata by reason of that decision.

MR. KNIGIN: There is absolutely no basis for cross-examining a witness about a judge's decision.

If he would like to ask the witness questions about that other proceeding, and as long as your Honor believes that there is some relevancy insofar as it may go to impeach the credibility of this witness, I have no objection.

But how is this witness bound by the judge's decision? In what way does what the judge say about the case-- in what way is it binding upon this witness?

THE COURT: It is not, of course. It is not yet clear to me that Mr. Schwartz is offering it,or asking me to consider it on the theory that what Judge Bonsal did is binding in any way on me.

That is what underlay my question about collateral estoppel.

MR. KNIGIN: I think he has indicated that that is not his theory.

THE COURT: That is so.

I will permit the line of questioning to proceed, Mr. Schwartz, but it is not entirely clear to me yet just what proper use, in the absence of any suggestion of collateral estoppel, you can make of this particular decision.

MR. SCHWARTZ: I am only using it for the cross-examination of the witness.

THE COURT: You ask that this copy of an opinion be marked?

MR. SCHWARTZ: Yes.

THE COURT: Mark it for identification.

xx (Defendant's Exhibit M marked for identification)

MR. SCHWARTZ: May I hand this to your Honor so you may follow me.

BY MR. SCHWARTZ:

Q Were you present at the trial of the action before Judge Bonsal?

A Yes.

Q Was there testimony at that trial -- withdraw that.

In the course of that trial was there introduced in evidence the minutes of the trustees' various meetings regarding the Neisco transaction in Chapter XI?

A Mr. Schwartz, are you asking for the minutes of the Bankruptcy Court or the trustees of the pension fund?

Q Let me withdraw that question.

I show you Exhibit F in this case and I ask you to look at the extracts of the minutes of the trustees of the pension fund, including the conference call, and ask you whether these documents were also items of evidence before

Judge Bonsal in the Horvath case?

MR. KNIGIN: Objection, your Honor. I don't know what the relevancy is of what went on before Judge Bonsal.

THE COURT: What is the relevancy,Mr. Schwartz? I have a record of evidence before me. What difference does it make what evidence was put in in a suit between different parties before a different judge as to which you urge no collateral estoppel here?

MR. SCHWARTZ: I am not directing myself to collateral estoppel. I am directing myself to the testimony of this witness; for example, that nothing hung together, everything was separate. Neisco was a separate deal from anything else. The minutes in this case show that it wasn't. I want him to -- I want to examine him on that question to show that all these things hung together.

THE COURT: You can do that within the context of the evidence in this case. If there is something in the evidence in this case that permits you to attack this witness' testimony on those points, then, of course, you are at liberty to do so. But I don't see how it is appropriate to examine this witness in respect of evidence that was submitted in an entirely different proceeding.

MR. SCHWARTZ: Let me withdraw that question.

THE COURT: I think you should.

MR. SCHWARTZ: May we have the petition under Chapter XI.

Q I understood your testimony to be that on November 19, when you were in Chicago, Mr. George Horvath had still not agreed to go along with the Chapter XI proceeding and that at the meeting various people tried to convince him to go along, is that correct?

A I think so.

Q Do you know when Mr. Horvath signed the petition under Chapter XI?

A No, I don't. But I believe that the petition-- the preparation of that petition was made in early November.

Q Do you know that Mr. George Horvath signed the petition before that meeting?

A It is quite possible.

Q Do you know if that petition was filed shortly after the retention of plaintiffs in this action as counsel for Neisco?

A I would assume so. I think you will find it was filed somewhere around the 24th of November.

Q I show you Defendant's Exhibit A and ask you whether you can identify the signature of George Horvath on the petition.

A It appears to be his signature.

Q Is his signature also on the verification of the petition?

A It appears to be his signature.

Q Is that dated November 6, 1969?

A I didn't notice the date.

Q Will you do so?

A It appears to be dated the 6th of November.

Q That was 13 days before this meeting of November 19 when he was still reluctant to go along with the Chapter XI proceeding?

A Yes.

THE COURT: Does the record indicate when the petition was actually filed in court?

MR. SCHWARTZ: Thepetition was actually filed on November 24th. I don't know if the record indicates that, but that is the stamp mark on this paper which was filed with the petition.

Q Can you tell us what was said at the meeting of November 5th by anyone on behalf of the fund-- withdraw that.

When did this meeting convene on November 5, 1969?

A What time during the day?

Q Yes.

A I can only guess. Probably late morning.

Q What time?

A I can only guess as being late morning.

Q When did it terminate?

A About three, four o'clock. My guess would be about three, four o'clock.

Q I would appreciate your lifting your voice a little bit.

So that it took about five or six hours?

A My recollection is that these were long meetings, they were two, three hour meetings, without interruptions.

Q Would it help refresh your recollection if I pointed out to you that on Plaintiff's Exhibit 12 for identification, plaintiff's claim that the trip, including travel time, took thirteen hours?

A I don't know what you are refreshing my recollection about, Mr. Schwartz.

Q I'm trying to fix the length of the meeting.

A I think I have indicated we probably left -- we left in the morning early, it took approximately three, three and a half hours to get to Mr. Dorfman's office, and it is at least three, three and a half hours to return,and we probably stopped, and that would account for a full day, getting home late at night and leaving early in the morning.

Q Can you tell us what subjects were discussed at this meeting, and to the best of your recollection, who said what?

A The Horvath people were asking for money and indicating a need, and also a possibility that with additional capital the company could be successful.

My recollection is that Mr. Matheson was and always was concerned about the diversion of moneys between the Horvath companies.

Q The what?

A Diversions of moneys,meaning money going out of Neisco into Montmartre, or into Mt. Clemens Corp. who in previous years had considerable loans from thepension fund.

Mr. Teitlebaum was concerned about control.

Q What else was discussed?

A I don't think very much else was discussed.

Q Was there discussion of Montmartre in relation to the diversion of moneys?

A Not that I recall, except that their concept of diversion of money was a general concept, which generally came up by Mr. Matheson --

Q What was said at that time? You have a recollection --

A He wanted to leave the money in the company.

Q Was there any request at that time for a signature on the Montmartre bank account, countersignature?

A At about that time there were negotiations about Montmartre. I don't believe they took place in Chicago at that time. My recollection is that ultimately, somewhere in November, December, there was a six-month agreement entered into with respect to Montmartre which provided for a countersignature by the fund people.

I was not involved in that negotiation, however.

Q Are these all the items that were discussed in the meeting that took about five or six hours?

A I think I said so.

Q Can you tell us what anyone specifically said about any subject matter?

A No.

Q Can you tell us anything that Mr. Radom specifically said?

A One thing strikes me very vividly about Mr. Radom on the meeting of the 19th. He told Mr. Horvath before he does anything to have his lawyer call him; otherwise, not. Mr. Radom spent most of his time sitting and listening.

THE COURT: What did he say on the 19th "before you do anything" --

THE WITNESS: "-- have your lawyer call me."

THE COURT: All right.

Q Do you recall anything specific that Joseph Teitlebaum said?

A Not specific. He was pressing for the filing of a Chapter XI. He wanted it under court supervision. He felt that they could help us, but only if we were under court supervision.

Q Was that because of the diversion of moneys from one Horvath company to another?

A No, because I think because of the magnitude of the losses that had been involved. There were moneys diverted from one operating entity to another. I believe on analysis the moneys would have gone from one fund secured company to a different secured fund company, consistent with decent business practice.

Q Do you recall anything specific that Mr. Matheson may have said?

A Not beyond what I have said.

Q Do you recall anything specific that Mr. Dorfman may have said?

A Mr. Dorfman didn't participate that much. I don't recall specifically, except him saying "hello."

Q Do you recall anything specific that anyone else on behalf of the trustees said?

A Mr. Weisser was concerned about making arrangements coming into meet with us. That is about it.

Q Do you recall anything specific that George Horvath said?

A No.

Q Do you recall anything specific that Mr. Ballon said?

A Not other than what I have already testified to.

Q Do you recall anything specific that you said?

A No.

Q Are you familiar with the issues in this case?

A Very generally.

Q Were you briefed at all as to what the factual issues are in the case before you came into court here today?

A I believe I had about a half hour to three-quarters of an hour meeting with Mr. Knigin last week.

I also have in my files a copy of the complaint in this matter made a couple of years ago.

Q Do you have any notes of what took place at the meeting in Chicago in November,either meeting?

A No.

Q Do you have any material at all that has been used by you to refresh your recollection as to what took place at that meeting?

A No.

Q You say you don't?

A My memory was refreshed with respect to the specific dates.

Q By whom?

A I believe by Mr. Knigin and I believe by -- by reviewing some of the transcripts in the other matter, in connection with the other matter.

Q Did Mr.Knigin summarize to you the testimony of Mr. Ballon as to the expenses or respective expenses of the Chapter XI?

A No.

In the sense of what he, Mr. Ballon, testified to here?

Q Yes.

A No.

Q Or what they claim here?

A I met with Mr. Knigin prior to this trial commencing.

Q You were counsel to the Neisco Corp. for some years before the Chapter XI, were you not?

A Yes.

Q For how many years?

A Two years.

Q Two years?

A Yes.

Q How long had you known Mr. Horvath?

A Since 1963.

Q Had you represented him during that time in connection with--

A Since 1963.

Q In your representing Ernest Horvath in the Horvath v. Duffey case, is any part of your retainer contingет upon recovery?

A No.

Q Is that case still pending before Judge Bonsal?

A Yes.

Q And have you asked him to reconsider his decision and to retry the contract issues so that you may offer more evidence on that subject?

A Could I hear the question, please?

(Question read)

THE WITNESS: Your Honor, I am in a dilemma.

I should have counsel here. I don't know how much we are getting into items that are frankly privileged to this other case and I am not able to reveal.

The issues are different. The time frame is different.

We allege there a contract in April of 1970. It has little to do with this issue of engaging Mr. Ballon on the filing of the Chapter XI.

We have filed memoranda with the Court. The decision was -- the case was truncated into what we feel was an unfair method of trying the case, separating contract conditions from any other situations.

Yes, we were upset with the decision and we do intend to protest, but I don't think it is proper subject matter to be elicited from me here.

THE COURT: I think the question has been substantially answered, Mr. Polish. If in response to future questions you wish to invoke a privilege particular to you in the circumstances or to your client in that case, or advance any other bases for not answering the particular question, I will consider it at that time.

I think the pending question has been substantially answered.

THE WITNESS: Yes.

Q Do you recall whether at the meeting of November 5th there was any statement by Mr. Matheson as to the overall cost of the Chapter XI proceeding to the fund, apart from the money they advanced for operating expenses?

A Mr. Matheson was curious about what it would cost.

Q What did he say?

A Either he or Mr. Teitlebaum asked Mr. Ballon to outline what he expected the costs to be.

Q What did Mr. Ballon say?

A Mr. Ballon indicated his feeling that the creditors would settle for approximately $75,000, that there would be a fee for the attorney for the creditors committee of about $25,000, there would be other costs.

He spelled out his own fees.

Q What were the other costs?

A I think there is a secretary to the creditors committee, there is a referee's fund of some sort.

Q Did he offer an estimate of those?

A I think it amounted to about $5,000, $6,000.

Q What was said about the government claim?

A He indicated with the government claim, that the policy was to pay the government at least as much as the payment to the general creditors, and then you could work the balance out over five years, or something like that.

Q Do you know what the government claim was ultimately settled at?

A I think the government claimwas in the area of $400,000 or $500,000, somewhere I think around 450, somewhere in that area. The pension fund was to guarantee the payment of half of it. I think the down payment was to be something like $100,000.

Q Was anything of that scope discussed at the meeting of November 5 or 19?

A No. The amount of the payment was not discussed other than my indication that Mr. Ballon indicated that the custom would be to pay an amount equal to the dividend to the general creditors as your down payment. But the amount of taxes was known. It was certainly known by the 19th if it wasn't known by the 5th.

Q Did Mr. Ballon indicate that the total cost to the fund would be about $200,000, not over that?

A With the payments from the creditors, with the payments to the government?

Q Including the payments to the creditors, the government, to the creditors committee, to the referee's fund and to Ballon, Stoll & Itzler?

A I think it would have had to have been over $300,000, something like $300,000.

Q Do you recall anything that he said about that?

A I think I testified to what I recall he said about it. That the creditors would get -- he felt they would settle for something like 15 cents on a dollar, which at that time was estimated to be $75,000. The government would have to be given $75,000 if he gave the general creditors $75,000. Whether that is a cost or not in the sense of money that was owed-- if the fund was going to be funding it, the money had to be paid sooner or later. I don't know how you consider the payment to the creditors as a cost or the payment to the government as a cost.

The payment of the fees would have been costs, and those were clearly discussed.

Q Adding up the figures you have given us, I have a total of $255,000; does that agree with your recollection of what the total anticipated expense was in the discussion at that meeting?

MR. KNIGIN: I object to the form of the question in view of the fact that the witness has now testified about $75,000 to general unsecured creditors, $75,000 to IRS, which is $150,000: $25,000 to the creditors committee attorney, is $175,000, $100,000 to Mr. Ballon, which is $275,000, and $5,000 in miscellaneous costs, which is already $280,000, and I don't know where Mr. Schwartz gets his figures, and I think that is always the danger about trying to recapitulate a witness' testimony.

THE COURT: Mr. Polish testified to certain specific cost components, and Mr. Schwartz is now cross-examining him on the total picture.

I think that is proper.

MR. SCHWARTZ: I think Mr. Knigin is right in the sense that the total is $280,000 rather than $255.

A In the sense that $25,000 was coming out of the Montmartre, yes.

Q The $25,000 coming out of Montmartre did not come out of the fund, did it? It came out of Montmartre?

A I think at that point, Mr. Schwartz, the Montmartre owed the pension fund several million dollars.

Q About $13 million?

A No, I don't think it was that much. My recollection is that it was probably in the area of $7 million or $8 million and that had been owed to the fund.

Q In any case, the total of the items that Mr. Ballon mentioned with or without Montmartre, was under $300,000?

A The way I have testified, yes.

Q Did anyone make any statement that you recall to Mr. Ballon, "Go ahead, file the Chapter XI proceeding and we will pay your fees no matter whether or not there is a successful plan or coutomce"?

A I don't think they used just those words.

Q Can you recall any words that anyone did use at that meeting?

A They said, "We will help you. We will put this company back on its two feet. We will reorganize it for you, provide the funds for the reorganization. Go ahead and file."

Q Did anyone say, "Go ahead and file. We will fund it no matter what the general creditors want, no matter what the government wants, no matter what anybody wants"?

A Yes. The issue was not settling with creditors or settling with the United States Government. The issue was putting moneys up and in a way that they could control the utilization of the money.

Q Will you answer my question, Mr. Polish, which was not what the issue was, but what was said at the meeting.

A This is what was said at the meeting. The issue was -- it was not that much to be--

Q Who said what at the meeting?

MR. KNIGIN: Your Honor, this question has been asked and answered now about four times as to who said what at the meeting.

MR. SCHWARTZ: I haven't gotten an answer yet, Mr. Knigin.

MR. KNIGIN: The record will speak as to that. I feel that Mr. Schwartz is now laboriously repeating the same thing over and over again in what seems to be an exercise in futility.

THE COURT: I will permit further cross-examination on who said what, if the witness can remember.

A I think that is the position of the Horvath side that it didn't make sense to go into Chapter XI considering the general creditors. That is the position of the pension fund's attorneys, principally, I think Mr. Teitlebaum--this was the first time I met Mr. Radom and he was quiet. He said, "No, we understand that. We want it to go into Chapter XI where we can have control over the operation, where we won't be criticized as to what we do."

There was no question as to whether or not they would fund it or take care of it or take us out of Chapter XI.

Q Did anybody on behalf of the fund say in words or in substance, "We will fund any plan that is promulgated"?

A In substance, yes.

Q Who said it?

A They were not concerned-- Teitlebuam said, "File it. Don't worry about it. We will work it out the best way for you to work it out."

Q Was it a question of working out a plan or the question of the carte blanche?

A To me it was carte blanche.

Q So if the government insisted on full payment of its claim at the time of confirmation of the plan, that would have been within the scope of their undertaking?

A In my opinion, yes.

Q If the creditors insisted upon 100% payment of their debts, that would have been within the scope of the undertaking?

A In my opinion, [illegible]

Q And if the creditors committe, instead of coming in with $25,000, wanted $50,000, that would be within the scope of the undertaking?

A I think there is some judicial discretion on that, the fee to the creditors committee.

Q Mr. Polish, I didn't ask you about judicial discretion.

I'm trying to establish what the scope of the understanding was --

MR. KNIGIN: Mr. Schwartz asked a question and this witness gave a very cogent answer.

His question was: Do you mean that the creditors committee attorney could have asked for any amount they wanted, and Mr. Polish said that this understanding was there was some judicial discretion involved.

I think that was a very forthright and direct answer to his query.

MR. SCHWARTZ: My question was not the way Mr. Knigin paraphrased it. My question was: Was that within the scope of the understanding as this witness understood it at that meeting?

MR. KNIGIN: He already answered that question yes, your Honor.

THE COURT: Mr. Polish, I appreciate your testimony that you say you came away with the impression that what the fund was giving in respect of a proposed arrangement was, to use your phrase, carte blanche?

Is that so?

THE WITNESS: That wasn't my phrase. That was

Mr. Schwartz' phrase.

THE COURT: You embraced it, I believe.

THE WITNESS: Excuse me. If I did, your Honor, I did.

THE COURT: What specific remarks can you remember fund representatives making on the subject of the funding of the plan or whether the plan was going to succeed, and the terms of the plan?

THE WITNESS: Your Honor, I think this has to be in the context of wat was happening with this company at the time. The fund had some million and a half dollars invested in Neisco, which was in a sense an operating company, and in addition, it had some four million dollars in a company called Masmo, the textile assets of Masmo, which were utilized by Neisco.

In effect, the fund had at least five and a half million dollars tied up in this textile business, in this whole package.

We were talking about-- we all recognized that if the mills closed, you had a pile of junk and worthless real estate.

This was a fiarly large manufacturer of upholstery fabric, and the industry, from my understanding, is one that requires total continuity of pattern, design, because when your furniture manufacturer orders furniture for his line, doesn't come in and say, "Give me three thousand yards of fabric that you manufactured this year." He distributes samples to all of his customers and he comes back to you periodically for his goods, and he expects you to be there because--

THE COURT: I know a good deal about the background now.

My question, and it is also Mr. Schwartz' question, is what did these people say?

THE WITNESS: They said they felt they had to help us. They had to fund-- they had to give us the money to keep going to put this company back on its two feet.

They asked for a Chapter XI.

Mr. Horvath, and I don't know whether I spoke up, but Mr. Horvath indicated at the meeting that he felt that a Chapter XI was unnecessary because of the size of the debts involved, of the general creditor debt.

They indicated they didn't care what it cost, that it was necessary in terms of the overall picture to have it within a Chapter XI.

The general creditor debt, as far as they were concerned, was just a pimple on top of this mountain.

THE COURT: Are you telling me that someone representing the fund said in those words: "We don't care how much it costs, we want to put it back on its feet"?

THE WITNESS: In just so many words, probably not. But in the words of, yes, Mr. Ballon - - we brought Mr. Ballon in. Teitlebaum introduced him to the other people there. He was introduced as a recognized expert on bankruptcies. He is practicing in New York City. He will do the job right.

It wasn't an issue of throwing moneys away. It was doing a reasonable job.

By the way, to put the amount owing to the federal government in context, it was probably no more than a quarter and a half of withholding taxes, which does not minimize the amount of money, but if the company had continued operating the way it had operated, that amount owing could always have remained.

BY MR. SCHWARTZ:

Q Would it be fair to state that the discussion as to the expenses of the Chapter XI were in context of a confirmation ultimately of a plan acceptable to the trustees?

A I think the only qualification I could add to it, Mr. Schwartz, in all honesty, is that it was a reasonable plan.

Q A reasonable plan acceptable to the trustees?

A I said a reasonable plan.

Q You mean they had no control whether it was acceptable to them or not?

A They could have done what they ultimately did, decide not to go ahead, Mr. Schwartz.

Q Was it your understanding they reserved that right, if they felt it was unreasonable at the end?

A No.

Q Who said what to give you the impression that they did not reserve that right?

A You said "reasonable at the end" -- at the end I didn't think they reserved that right. I think they participated and set the ground rules for every step of that plan and agreed to it.

Q My question, Mr. Polish, is not what happened at the end. My question --

A You asked me about the end.

Q What was the understanding at this meeting, in your opinion, did they reserve the right at this meeting to refuse to go ahead if they felt the plan was unreasonable?

A Not in those words. Not specifically. The issue was: Get in there and work out a reasonable plan, and they will foot the bill.

Q Would it be-- withdraw that.

If they had to pay all debts in full, would they not have been committed to well over a million dollars, in addition to the million, six they put into Neisco for operating?

A My recollection is no. My recollection is not that good on it. My recollection is that it is under a half million for trade debt, and less than a half million for the federal government.

Q That is,two half-millions make one million?

A Both were less than a half million, to my recollection.

Q I show you this proposal for the settlement on the government claim, which has been marked Exhibit K for identification in this proceeding.

Does that refresh your recollection as to what the government debt was?

A Would you show me what you are indicating, Mr. Schwartz?

Q Did the government file a proof of claim for this amount here, $1,300,000 some odd?

A Yes.

Q And that was ultimately settled for four hundred --

A The government filed two separate proofs of claims--

Q Was that ultimately--

MR. KNIGIN: Your Honor, he is not letting the witness answer. He was in the middle of an answer and he cut him off.

THE COURT: That is true.

Go ahead, Mr. Polish.

Q What is your answer?

A Neisco showed a tax liability, federal withholding tax liability, of some $450,000.

In the course of the proceeding the government filed an additional claim of some $700,000 related to withholding taxes owed by Masmo since 1963 and attempted to assert that they were a Neisco obligation, also.

In all the negotiations that I was aware of with the government they had dropped any notion of the $700,000 coming out of Neisco.

Q Did they ultimately come to an agreement of settlement of the claim for some $450,000?

A This is what it appears to be.

Q And those were all Neisco obligations, were they not?

A Yes.

Q Not a quarter of a million --

MR. KNIGIN: What was the question?

THE COURT: Not a quarter of a million.

A I testified-- well, I don't think I ever testified that Neisco owed a quarter of a million.

Q A quarter of a million.

A I don't think I testified to that, Mr. Schwartz. I said the government --

Q My recollection is you did say that.

A If I did, I was in error.

MR. KNIGIN: Just a moment.

Your Honor, I don't know what Mr. Schwartz is getting into, but certainly this witness very clearly stated just two minutes ago that he thought that the general unsecured creditors was about a half million,he thought the IRS claim was about a half million, and I remember Mr. Schwartz saying that makes a million all by itself; now Mr. Schwartz asks four questions more, turns around, and walks away, and says "Isn't that a quarter of a million?"

That is an absolute flagrant disregard of his own cross-examination.

THE COURT: The record will speak for itself.

A I indicated the government quaranteed half of that liability, and I think I said it was slightly less than a quarter of a million. That was the Neisco guarantee-- the fund quarantee was like almost a quarter of a million dollars.

Q If the government had insisted on full payment, the fund would have been committed for over a million dollars to cover creditors and the government and the administration expenses and whatever else was involved?

A If those were the numbers, yes.

Q Is it your testimony that your understanding at that meeting, the two meetings in November 1969, committed the pension fund to accept that kind of plan of arrangement if it were the only thing to be approved?

A I son't think any of us contemplated that kind of claim.

Q As a matter of fact, was there any contemplation of any final agreement until the things developed in the course of the Chapter XI and we got to the end of the thing and found out what was there?

A I think there was a contemplation of a settlement in the area of 15% give or take some reasonable amount for general creditors, some kind of workout with the federal government.

Q You said you have read the complaint in this action, Mr. Polish.

A I haven't read the complaint in this action for probably two and a half years.

Q Do you recall that the-- I will show it to you -- I show you the amended complaint and I direct your attention to Paragraph 7th.

Will you read that and I'll ask you about it.

(Pause)

A All right.

Q Paragraph 7th alleges in substance --

MR. KNIGIN: I don't think he has to go over that. We read it. It is in evidence. It is deemed marked in evidence.

If he has any questions, he should direct the questions directly to the witness.

MR. SCHWARTZ: I want to ask a question as to the phraseology here.

THE COURT: Go ahead.

Q This paragraph alleges that the fund -- I am quoting -- "unconditionally promised and agreed to pay plaintiff a reasonable value of the said legal services."

Do you recall any discussion at the meetings in November of 1969 at which anyone on behalf of the fund stated that they would pay plaintiff's legal fees in the Neisco proceeding, regardless of any other conditions?

MR. KNIGIN: Objection to the form, unless the question is other than that which has already been testified by the witness at length.

He has already testified as to what unconditional sums were going to be paid and under what circumstances.

THE COURT: I will overrule the objection to the form.

Read the question.

(Question read)

THE WITNESS: I testified as to discussions about Mr. Ballon being queried about the costs. Afterward they indicated they would fund the Chapter XI and they would provide enough moneys to pay for the expenses of it.

I don't think we would-- it was ever contemplated that it wouldn't go through. It was -- in my mind, it was inconceivable that there would be any other result unless they changed their mind.

Q Was it your understanding that if the arrangement didn't go through that there would be liability for fees, in any case?

A I didn't think about that, Mr. Schwartz.

Q Would it be fair to state, then, that there was no discussion of that at all?

A No.

Q When you say "no," you mean --

A Not at all.

Q There was no discussion about that at all?

A No.

Q I direct your attention to Paragraph 27th of the complaint and ask you to read that.

(Pause)

A Yes.

Q This paragraph alleges, and I quote: The fund "unconditionally promised and agreed that it will take all necessary steps and furnish all of the funds required to confirm any arrangement or plan acceptable to Neisco's general unsecured creditors, including payment for the legal services to be rendered by plaintiff in the Chapter XI proceeding and all other administration expenses of said proceeding."

Do you recall anyone on behalf of the fund who made such a statement on that meeting of November 5 or the

November 19th meeting?

A Not in so many words.

Q Do you recall anyone specifically who said anything which would lead to the conclusion that I read to you?

A I think the words I testified to, my impressions, that they were prepared to fund a plan that Mr. Ballon and Mr. Horvath would have worked out and felt advisable for the company.

Q Who said that?

A That is the sum total of the impression that the fund left us with.

Q Did there come a time when discussions came up about a consultation agreement between Ernest Horvath and Neisco?

A Yes.

I am questioning the relevance of that.

Q When was that?

A Somewhere starting in April of 1970.

Q And there were quite a few discussions about the terms of that contract?

MR. KNIGIN: Your Honor, I presume that counsel is going in some way to relate this entire discussion to the issues of this case.

THE COURT: I think I understand the thrust of the issues. This is something that we have been hearing about for some time: the question of whether the various Horvath-related difficulties or indebtedness with the fund should be regarded as part of one overall settlement, or whether they are severable, separate and distinct.

That is the question.

You say the one and you say the other.

MR. KNIGIN: We are now talking about a point in time, according to this witness, six months after the alleged contract was made.

THE COURT: I understand that. We have had a good deal of testimony on this general subject from the other witnesses, and I will permit Mr. Schwartz to inquire of this witness on the subject, if he wishes.

(Question read)

THE WITNESS: Yes.

Q Did there come a time when the Horvaths took the position that unless such a consulting agreement were worked out on satisfactory terms, there would be no arrangement?

A Mr. Schwartz, I'd rather put it a different way.

In April, 1970, the pension fund said: "We will reorganize it but not for your benefit. You will convey it to us, and we will give your brother a consulting agreement for life."

THE COURT: By "We will reorganize it" you mean reorganize the company?

THE WITNESS: "We want to take over the business of Neisco. You will convey it to us in the shape, form and manner that we choose, and we will give your brother a consulting agreement for life."

Q Were there negotiations with regard to the terms of that consulting agreement?

A Many.

Q And did they reach an impasse at some particular time?

A The way those negotiations went, Mr. Schwartz, is there was an agreement made as to the terms of the agreement, and then at subsequent dates the fund would change the terms of it and would renegotiate the terms, cut them slightly and agree to go ahead.

Q Can you answer the question which I asked you, Mr. Polish.

I ask the reporter to read it back.

(Record read)

THE COURT: Did those negotiations reach an impasse?

THE WITNESS: Your Honor, I don't know what an impasse is. If an impasse means that the Horvaths were not going to go ahead under any circumstances, no, they never reached an impasse. But there were standoffs. There were backwards and forwards meetings, and on various occasions the Bankruptcy Court entered into it.

Two specific ones that I recall were the terms of the agreement read into the record at the Bankruptcy Court only to be changed by the fund a few days later.

THE COURT: Was a final agreement ever reached?

THE WITNESS: I thought a final agreement was reached on February 1 or 2, 1972 before Referee Babbitt, modified drafts were filed in that court as exhibits in the case indicating what was to be signed -- I think Referee Babbitt asked for them to be signed as to what the deal was with Ernest Horvath.

This is at a time when all the consents were filed in terms of the Chapter XI and at that point Referee Babbitt set a meeting several days later for a hearing on feasibility.

We went through the hearing on feasibility -- I'm not a bankruptcy expert by any means. There was a hearing on feasibility that I was present at. He found for feasibility and everything was set, at which point shortly thereafter, my recollection is the fund advised everybody they were not going ahead and took it over by foreclosure.

Q Did there come a time before this particular hearing where Judge Babbitt stated that he was not going to use the offices of his court to get Ernest Horvath a lifetime employment contract?

A I believe he did.

Q And on that occasion was it represented to Judge Babbitt that unless a contract were obtained that was satisfactory, the Horvaths would not consent to any arrangement?

A I don't recall what was said on the record there, Mr. Schwartz.

Q Were there discussions throughout this period in 1970 about Montmartre?

A Which period?

Q 1970, early part of 1970.

A Yes.

Q Were you present in Mr. Ballon's office on some of these occasions?

A Yes.

Q Were you there on April 6, 1970?

A Yes.

Q I show you Plaintiff's Exhibit 5 in this action and ask you whether that fairly states the subjects that were discussed at that meeting of April 6, 1970.

A Mr. Schwartz, some of this is indicative of the state of negotiations. Other items in here I was never familiar with.

MR. SCHWARTZ: Will you read that answer, please?

(Answer read)

Q Do you recall wehther all of these items were discussed on that April 6 meeting?

A I indicated, Mr. Schwartz, some of the items in there I have no direct knowledge of, and to my knowledge they were not discussed at the April 6th meeting.

Q Were any of these items resolved at the April 6th meeting?

A Let's not talk about "these" items when you talk about items.

Q Was there any resolution of the request that Neisco should repay Montmartre $85,000 for legal and accounting fees?

A People representing the fund at the time indicated it would be that-- my recollection is yes.

Q Was any agreement ever signed in respect of that subject matter?

A No.

Q Was any repayment ever made?

A I don't know.

Q Did Neisco ever make arrangements with John Allan to release some stock of Netherlands Mines?

A Ultimately they did.

Q Did that involve the fund?

A I think so.

Q Was there ever any agreement on that subject?

A I don't know but the Horvaths got the Netherlands Mines stock back.

Q You don't know if they did get it back?

A They did get it back.

Q You don't know how, though?

A It was released by John Allan.

Q Did the Horvaths ever execute general releases to the fund releasing their interests in the Neisco properties?

A No. But they were prepared to, based upon testimony in court.

Q Did the fund ever rewrite the mortgage covering the Montmartre property?

A After extensive negotiations with the fund, Mr. Schwartz, a final draft of the new relationship between the fund and the Montmartre property was established. That was somewhere in 1971, February. Messrs. Radom and Teitlebaum agreed to it, they asked me for some kind of -- to have George Horvath make some kind of good faith showing, and he caused to be deposited in my escrow account -- what was estimated to have been a monthly payment, based upon their convincing me that they were sincere in having the fund going ahead, and the fund had committed themselves to go ahead with the hotel reorganization.

I believe in mid-March, 1971, they convinced me to a point where I released the money to them, and Mr. Horvath continued to make two additional payments based upon their statement that it is going ahead,"we are going to work the Montmartre situation out with you in accordance with the documents that we have, that you have agreed to."

Q Did the Montmartre eventually wind up in a foreclosure proceeding with a counterclaim by Horvath?

A That's right.

Q And was there any resolution prior to the foreclosure?

A Pardon?

Q Was there any resolution of that subject prior to the foreclosure?

A No, the fund walked away from the arrangement they had made. In reality, their loan was knocked down after that lawsuit from something like $9 million to $3 million.

Q Did the fund ever sign any agreement with respect to Montmartre?

A No, but their attorneys came to me and said, "Here are the papers, Jack." They dealt with us for like ten years. "Release the money."

I released thirty some odd thousand dollars that day on their handshake.

Q See if you can't answer the question I put to you without explanation.

Did there ever come a time prior to litigation that the fund and the Horvaths ever worked out an arrangement or a settlement of the Montmartre problem?

A Yes.

Q Prior to litigation?

A Yes.

Q When?

A Somewhere in -- from certainly in February, March 1971 as to what was happening with the Montmartre, and the papers were drawn.

Q Was there any written agreement reflecting the terms-

A Signed by both parties, no.

Q Did the fund ever advance the funds needed to buy a 5/8 interest in some adjoining property?

A No, not to my knowledge, Mr. Schwartz. They told us to make the commitment to buy it.

Q Mr. Polish, are you-- are you a witness here. I widh you would confine your comments to my questions.

Was there any discussion about the Horvaths' insurance policies?

A Yes.

Q Were they ever returned to the Horvaths by the fund?

A Not to my knowledge.

Q Isn't it a fact that at this meeting of April 6th, there were a lot of discussions about a lot of problems and there were a lot of proposals, but there were no ultimate resolutions?

A No, I don't think that is true. If ultimate means in your terminology the signing of a piece of paper, no.

Q Nothing was ever signed by both parties as to any of these problems?

A "Nothing" is a big word.

Q No final agreements were signed?

A No final agreements were signed.

Q Were you present at the meeting on April 20, 1970 at Mr. Ballon's office?

A I don't think so.

MR. SCHWARTZ: I think that's it, your Honor.

MR.KNIGIN: I just have a few questions.

THE COURT: Proceed.

REDIRECT EXAMINATION

BY MR. KNIGIN:

Q Mr. Polish, you testified to two meetings in Chicago at which the fund representatives were present, November 5 and November 19?

A Yes.

Q Did the fund give Mr. Ballon the authority to go forward with the filing of the Chapter XI before the November 19 meeting?

A I think they were asking him to do it from November 5 on. They were in New York somewhere around the 11th or 12th, somewhere in that next week, where they looked through our records to get cash flows, and I think they were pushing us to do it as soon as possible.

Q When was the ultimate direction given?

A I couldn't say. But I would guess about the 23rd or 24th.

Q How many times had Mr. Ballon, by that time, given an overview to the fund representatives as to approximately what it would cost them to fund the plan of arrangement, as he saw it in his professional judgment?

MR. SCHWARTZ: I object to the question, your Honor. He can testify as to when he was present.

Q Only when you were present, Mr. Polish.

MR. SCHWARTZ: Let's fix the dates and who was there.

Q On November 5, 11 and 19, were you present?

A I was present substantially all the time on the 5th and the 19th. On the 11th,part of the meeting was going on in my office, part of the meeting was going on in Mr. Horvath's office, I think they were meeting over in Mr. Ballon's office sometimes. There were people moving through our offices.

Q On the 5th and the 19th did they discuss how much it was going to cost?

A Yes.

Q Did Ballon tell it to them?

A Yes.

Q Did he go over each detail?

A I believe so.

Q Was that supposed to be a hard and fast figure?

A This is what it was estimated it would cost, what he would charge, and what the other things would be.

Q As a result of that discussion what did they tell him?

A "Go ahead." I think they did the same damn thing in New York around the 11th when they were developing the cash flows.

Q Did Mr. Ballon tell them that the general unsecured creditors would be settled for 100%?

A No.

Q Did he ever tell them that you would have to pay the IRS 100% right on the barrelhead?

A Nope. But you might.

Q By the way, speaking about the IRS, who ultimately-- let me ask you this. Did Ballon, Stoll & Itzler have anything to do with the settlement of the IRS claim on behalf of Neisco?

A It is my impression that Messrs. Vogel --

MR. SCHWARTZ: This is pure hearsay, your Honor. I object to the question --

A Mr. Vogel told me that he took over the negotiations with the IRS.

THE COURT: This is a witness who is counsel to Neisco. If he can answer the question of his own knowledge, he may do so.

Q What did Mr. Vogel tell you?

A He took over negotiations with the IRS. He knew the people. He would handle it.

Q Did he say anybody else was assisting him?

A Not to my recollection.

Q Do you know who went to Washington on behalf of Neisco?

A I think Mr. Vogel did. I think Mr. Vogel had just-- he had been in the U. S. Attorney's Office in New York in charge of taxes, and the people who were handling the taxes here in the U. S. Attorney's Office had worked for him.

Q He didn't go down as a U. S. Attorney, did he?

A No.

Q Who did he go down on behalf of?

A Neisco.

Q Who was he representing at the time?

A Neisco and the pension fund.

Q Both?

A I would say so. They involved me also in attempting to prove to the government the moneys were actually lent. They had been unable to do so.

Q By the way, was the plan ultimately-- the plan that was filed with this court, was it ultimately approved by a majority of the creditors, general unsecured creditors?

A I have been so informed.

Q Mr. Polish, as the attorney for Mr. Horvath and Neisco, would you have permitted Neisco to file the Chapter XI without the promise of the fund which you testified to?

MR. SCHWARTZ; I object to that, your Honor, as purely--

THE COURT: I will sustain the objection.

Q Did you rely on the fund's promise in filing the Chapter XI or -

MR. SCHWARTZ: I object to the question, your Honor.

THE COURT: I will overrule that objection.

A Yes.

Q By the way, Mr. Schwartz asked you a number of questions regarding the interrelation of companies,and I know I have asked you this question once, I want to ask it again -- at the time that the promise that you have indicated was made by the fund in relation to the funding of the Neisco bankruptcy, were there any restrictions placed on that promise by the fund members or their representatives in relation to the solving of the so-called other problems in the Horvath family of companies?

MR. SCHWARTZ: I object to the form of the question, your Honor. It is calling for a complete conclusion and if he wants to say what was said, fine. This is merely putting the conclusion of plaintiff's position to the witness.

THE COURT: Change the question to ask the witness if anything was said about such restrictions.

Q Was anything said about such restrictions?

A No.

MR. KNIGIN: No further questions.

MR. SCHWARTZ: May I, your Honor?

RECROSS-EXAMINATION

BY MR. SCHWARTZ:

Q I show you Plaintiff's Exhibit 2 for identification in this case.

Is that the plan of arrangement that the plaintiffs presented to the general creditors?

A I really don't know, Mr. Schwartz. I never saw it.

Q How do you know it was approved?

A Because I sat in Judge Babbitt's courtroom and heard the attorney for the creditors advise the Court that he had in his possession approvals.

Q Approvals of what?

A Of the plan.

Q What plan? What terms?

A I don't know, Mr. Schwartz. It was not my concern.

MR. SCHWARTZ: Thank you.

THE COURT: Mr. Polish, at the November 5 meeting in Chicago, do you specifically remember Mr. Ballon referring to a $25,000 retainer in response to an inquiry from a representative of the fund on the subject of cost?

THE WITNESS: I remember specific conversations with respect to the $25,000. Thereason I am fairly certin about it is that I knew they were contemplating restricting moneys coming out of Montmartre and we knew that this money had to come out of Montmartre over a period of time during the season. It couldn't come in November. It would have had to come after Christmas because the-- the season would generate dollars. So It had to be Montmartre and they had to be aware of it and had toagree with it.

THE COURT: You specifically recall that $25,000 would be what Mr. Ballon would require as a retainer?

THE WITNESS: Yes.

THE COURT: You also specifically recall that within the context of the overall costs of Chapter XI, Mr. Ballon mentioned a further $75,000 that he would require in respect of fee?

THE WITNESS: Yes.

THE COURT: This was in a large conference room, you say?

THE WITNESS: A large room. The room was -- the room was slightly shorter than this, but almost as wide as this. If I recall, it was a large table on one end and Mr. Dorfman had a kind of a desk over in the center. It was used as a conference room.

THE COURT: Were all the participants sitting around the same table?

THE WITNESS: Sitting around the table, if I recall. They were moving. There was no question they were moving, your Honor, because I don't think Mr. Dorfman spent five minutes with us. But I know that many times I was left with some of the people. I think Teitlebaum stayed almost throughout the entire thing. The accountant Weisser stayed all the time. I don't know. The other people were nameless people.

Q Was it a round or rectangular table?

A My recollection is it was a round table. I'm having trouble with that at this point. I think it was a round table.

Q You have probably seen a number of tables since then, but were the Ballon, Horvath- - were the Neisco representatives sitting together next to each other?

A Yes.

THE COURT: And the fund representatives that you have described were --

THE WITNESS: Scattered.

THE COURT: - - scattered?

THE WITNESS: Yes.

THE COURT: Do you recall -- where were you sitting? Who did you sit next to, do you remember?

THE WITNESS: I probably sat next to Mr. Horvath.

THE COURT: Where did Mr. Ballon sit?

THE COURT: The other side.

THE COURT: Of Mr. Horvath?

THE WITNESS: That's my guess.

THE COURT: Where did Mr. Radom sit, if you recall?

THE WITNESS: My impression is somewhere over there.

THE COURT: He was somewhere on the other side of the big round table?

THE WITNESS: Not on the other side. Mr. Teitlebaum was pretty much on the other side. These dialogues were generally going through Teitlebaum and myself. Radom was off on the side, Weisser was off on the side.

THE COURT: So you and Mr. Teitlebaum would address each other across the full diameter of the round table?

THE WITNESS: That's what is leading me to the problem. I visualize a round table, but I don't think Teitlebaum was that far from me. It must have been a large rectangle. I don't see Teitlebaum that far away from me.

THE COURT: Were you and Mr. Teitlebaum substantially face to face?

THE WITNESS: Where Mr. Ballon is now.

THE COURT: Mr.Radom was somewhere on the side?

THE WITNESS: This side. Weisser clearly I recall on the side.

THE COURT: Is it your recollection that Mr. Radom attended the entire meeting?

THE WITNESS: I believe he stepped out once or twice during the meeting, but he was there substantially for the meeting. He was there at the end of the meeting. He was there at the beginning also.

THE COURT: Do you have any recollection as to whether, when Mr. Ballon mentioned the $25,000 retainer and the $75,000 balance on the fee, Mr. Radom was in the room?

THE WITNESS: One thing is clear to me about Mr. Radom's presence, there is no question in the discussion of the $25,000 out of Montmartre, he was there, and he knew about it. The reason for my recollection of shis sort was it was like pulling teeth. Three, four months later it was like pulling teeth to get him to authorize the payment of those notes, and I knew and I told him I knew he was there when it happened.

Mr. Ballon asked me what I recall. It seemed that Radom for a-- he took a long time in authorizing the cosignatory to make payments. I think there is correspondence in January on that subject. I remember vividly he was part of it.

THE COURT: If I were to say to you that Mr. Radom has testified before me that during that November 5th 1969 meeting no mention was made of the $25,000 retainer, you would say that he was mistaken in his testimony?

THE WITNESS: I would say he is mistaken, yes.

THE COURT: All right.

That's all I have.

MR. KNIGIN: Does that conclude the testimony of this proceeding? The plaintiff has rested, as you know.

THE COURT: Yes.

If no one else has any further testimony, then I will -- defendant rests?

MR. SCHWARTZ: Yes. Subject, of course, to submitting the additional material.

THE COURT: I understand.

You are excused, Mr. Polish.

Thank you.

(Witness excused)

THE COURT: As far as future handling of the case is concerned, let me put one or two questions to counsel.

I understand that there is a defense of lack of in personam jurisdiction. It is not clear to me yet how service of process was attempted or effected in this case.

Can you enlighten me on that, Mr. Knigin?

MR. KNIGIN: Service was made upon the fund in Chicago.

THE COURT: By virtue of the long arm statute?

MR. KNIGIN: Yes.

THE COURT: So you rely on the long arm statute?

MR. KNIGIN: CPLR, Section 302.

THE COURT: It was agreed at the beginning of the hearing that it would be a practical thing to do to separate the trial on the merits, holding in reserve the reasonable value of services which I think as posing the question within a quantum meruit context.

But is that necessary or at least is it not possible that if I accepted certain aspects of the plaintiff's evidence, such a hearing would not be necessary?

What I mean by that is this: Isn't it open to me on this record, if I accept the evidence, to find that there was an agreement entered into in the November 1969 meetings and subsequently relied upon by the plaintiff law firm, pursuant to which they would be compensated through or by the fund for a total amount of $100,000?

I'm not saying that that is the way I am going to find, but what I am putting to you, I guess, in the first instance, Mr. Knigin, is do you at least agree that I could make such a finding, or are you relying entirely upon a quantum meruit theory?

MR.KNIGIN: Your Honor has anticipated the motion that I intend to make at the end of the entire case. Predicated upon the record as it ultimately has developed, my application is that the Court is empowered to make a finding that if a contract did in fact exist, then it has been established by the prima facie case as to what the terms of that contract were, and, consequently, the Court has within its jurisdiction the capability of finding that there was a breach of contract and the contract price was the amount stated by the plaintiff; That the only issue that would remain inthe event that the Court didn't find that would be the issue of quantum meruit, which would be an issue for a special damages hearing.

THE COURT: You don't have to respond to that, Mr. Schwartz.

MR. SCHWARTZ: I have reserved my motions, and I would like to reserve the motions at the end of the case also until we submit the matter to your Honor.

In my opinion, I don't think the testimony shows any contract of any kind. It shows a general understanding which I don't think anybody disputes that in the context of an overall settlement of all the controversies amongst the Horvaths, and in the context of an overall plan that was confirmed, provision might be made-- would be made to cover the fees-- the expense of the arrangement.

But I don't think there is any believable testimony-- certainly not believable testimony -- but I don't think there was any testimony that there was certainly a specific agreement to pay $100,000 willy-nilly. At the most, I think the plaintiff's theory has been reduced to a claim that the fund agreed to pay the expense of funding the arrangement proceeding, including their fees along with other fees, and that therefore they are entitled to recovery under a beneficiary theory, which came out during the discussion yesterday - - just what that is, I don't know. Apparently it is not supposed to be a third party beneficiary, but we don't know who the agreement was made with, but there is a beneficiary theory that counsel mentioned yesterday.

MR. KNIGIN: The witness mentioned.

MR. SCHWARTZ: Mr.Knigin, I didn't interrupt you.

MR. KNIGIN: I didn't mention it.

MR. SCHWARTZ: I didn't say you mentioned it. I said counsel. Mr. Ballon is counsel, Mr. Itzler is consel.

MR. KNIGIN: There is only one counsel.

MR. SCHWARTZ: So that I don't think that they have established a prima facie case on contract on any theory.

So it is hard for me to say how do I view the agreement to pay a fixed fee. I don't think there is enough evidence of an agreement to pay a fixed fee, no matter how the testimony is viewed.

THE COURT: All right. You need not argue it at length, gentlemen. In fact, I enjoin you not to do so.

(Discussion off the record)

THE COURT: Let the record show that as soon as possible counsel will exchange among themselves copies of whatever additional minutes or documents or information they intend to rely upon.

Main briefs after trial will be exchanged between counsel and delivered to chambers, Room 2904, two weeks from tomorrow. That will be the 13th of October. Main briefs to be exchanged and filed on October 13th and reply briefs to be exchanged and delivered to chambers on October 20th.

MR. SCHWARTZ: I wonder if your Honor could fix a time for the exchange of the minutes, bankruptcy minutes, because I wouldn't like to get them a day before the brief is due.

MR. KNIGIN: We will be very happy to give them no later than the close of business on the 21st of October, this Friday.

THE COURT: Is that acceptable, Mr. Schwartz?

MR. SCHWARTZ: Since Monday is Yom Kippur,that sort of custs my time down to check out these bankruptcy minutes.

MR. KNIGIN: We are giving them to him twelve days in advance.

MR. SCHWARTZ: You know exactly now and I don't know why you want to hold it up to Friday--

MR. KNIGIN: If he wanted a list of what it is we are going to use I can give that to him right now. You said about supplying him with copies of it.

MR. SCHWARTZ: I need a list with the date of a hearing, the page number.

MR. KNIGIN: We have that in court now. If he wants that now, I can give him that now. If it is questions of copies, I can't give it to him now.

MR. SCHWARTZ: You can give me the copies later. If you will give me-- you can send it over this afternoon by letter, that's all. At least let me have it so I can check our records. Many of these minutes, as I explained to your Honor, we don't have, and we have to get them.

MR. KNIGIN: Will you simply provide us, Mr. Schwartz, this afternoon, with your list of -

MR. SCHWARTZ: I don't know what I'm going to use until I see what you are using. I am not going through the minutes first.

MR. KNIGIN: It is beginning to sound like a cake-baking contest. He wants to see our recipe.

THE COURT: Send him your list this afternoon. You respond as soon, as you can, but in no event not later than Wednesday of next week.

MR. SCHWARTZ: That will be October 5th.

THE COURT: Thank you for your assistance throughout this trial, gentlemen. I found it very interesting.

...

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APPENDIX C TO DEFENDANTS' POST TRIAL MEMORANDUM -- EXCERPTS OF TRANSCRIPTS OF HEARINGS IN BANKRUPTCY COURT RE: NEISCO, INC. DATED SEPTEMBER 30, 1970 TO OCTOBER 20, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

BALLON, STOLL & ITZLER, :

Plaintiff, : 72 Civ. 2916 (C.S.H.)

- against - :

THOMAS J. DUFFEY, et als, :

Defendants. : APPENDIX C

---x

BEST COPY AVAILABLE

MR. SCHAEFFER: No, your Honor.

So your Honor may place into context what has been discussed with respect to Macmo, may I advise you that negotiations toward Neisco's being able to consummate its settlement offer and a plan of arrangement to confirm involve a multitude of things. In order for the debtor to procure the moneys necessary to consummate its offer from the Fund, it would be necessary for the Fund to acquire all of the stock of Neisco so that it will then merge with its lien and thereupon proceed with the operation of the business toward a possible larger salvage than an immediate liquidation at the present time.

Unfortunately the negotiations were taking place between the representatives of the Fund and two individuals managing the debtor corporation. They are George Horvath and Ernest Horvath.

When the facts are uncovered we learned that

George Horvath and Ernest Horvath do not own the stock of Nesico, Inc., and that a labyrinth of corporations, a whole corporate structure shows that ownership is in other persons outside the control of George and Ernes[illegible]orvath.

THE REFEREE: Persons including corporations?

MR. SCHAEFFER: Yes, sir.

The trustee in bankruptcy of Masmo would own approximately 70 per cent of the issued stock of a public corporation which, in turn, owns all of the issued stock of a closed corporation which, in turn, owns all of the stock of Neisco. Public stockholders of this public corporation would own approximately 30 per cent of its issued stock and down the line into Neisco.

In addition we learned -- one fact at a time -- that there are two classes of preferred stockholders of this public corporation. So we have a multitude of interested parties, an extremely difficult legal way of working this out.

So when my office entered upon the scene and learned that the negotiations were taking place with parties who in the vernacular could not deliver, we undertook, at least started, a path of undertaking to cure all of these defects, find some modus operandi and how to work this out.

Unfortunately it would appear, reasonably so, that two, three, four months may be needed to work out these multitude of problems.

Recently, in an effort to try to shorten that period I have been recommending to the Fund a shortcut involving an added increased risk which could conceivably bring this period down to sixty or ninety days' time.

It was then my thought, irrespective of many people attributing the idea to political motivation on the part of the Fund, that if the losses of the debtor could be curtailed and an examination of its operation would indicate that that could come about with what we think is a super structure of overhead, which is the New York office -- so it was my personal thought that by eliminating the greater part of that particular overhead we could bring this down to a near break-even point and I think I could prevail upon the Fund at that time to sit by and give us the several months needed to work out this very complex problem.

Unfortunately we ran into resistance on the part of the people managing the debtor corporation toward this reduction, with the result that there is an impasse. Our client, the Fund, is unwilling to pick up the tab any more and, of course, we get to all kinds of fancy theoretical formulae that we are not losing moneys, interest should not be included as an item for expense for $1.5 million or $1.4 million that we just loaned them. They are just stretching logic.

This firm is losing moneys every month. It has lost an aggregate, according to Wasserman & Taten, of $403,000 since November 24th when this proceeding started. We have the projections, reasonable, I think. Projections are at best a guess, projections for the coming months, although the latest figures of Wasserman & Taten are as of August 31. We already know, although not in final form -- the Is haven't been dotted and the Ts haven't been crossed, but we know they lost another $25,000 during the month of September.

The Fund is picking up the tab for all of this. There isn't anybody who could reasonably say that the realistic value of these assets are worth more than approximately 50, 60, 70 per cent of the moneys owing to the Fund. There is nobody here that has any equity and that's the realistic analysis of this situation.

Therefore, the attempts being made to cure what the persons managing the Neisco firm could not deliver, which is procuring title, buying from the trustee in bankruptcy of Masmo or, let's call it, right, title and interest as an all-inclusive term, although that in itself is broken down to many subdivisions and at an expense to whom? To the Fund again. It only partly cures the problem; it only partly solves the problem. We now even have to turn to the Government.

To confirm this plan of arrangement we must pick up and pay in full a priority claim.

That claim hopefully will be reduced in time to the amount scheduled. To date we do not know. The length of time it will take the Government to come to a conclusion of that will cost "X" amount of dollars in losses, again to be picked up by one person, the Fund, the victim in all of this, and this being a court of equity, I thank you for your patience in listening to another citizen who is entitled to the protection of this court, too.

Then the time elements. So we have got Masmo to be worked out; we have got the Government to be worked out, and we have got the losses involved in the time it will take to work this thing out legally and properly. This is our impasse. Everybody else is shaddow-boxing and fencing. That is the truth of the situation. We can't get anywheres, with the result that the Fund, in the spirit of complete cooperation, sincerity, goodwill, is willing to go along if other people will meet them halfway and cooperate. We do not find that.

THE REFEREE: To what extent is the Fund prepared to continue to carry this while we tie up these loose ends, Mr. Schaeffer?

MR. SCHAEFFER: According to Mr. Radom none.

THE REFEREE: Then I have to fix indemnity this morning.

MR. SCHAEFFER: They have run their string according to Mr. Radom.

THE REFEREE: Then I must fix indemnity, as I indicated last time, on losses for September and, while we are at it, since we are entering October and the statute places indemnity on future losses, I take testimony on October.

MR. LIPSON: May I be heard?

THE REFEREE: Yes.

MR. LIPSON: I listened very carefully --

THE REFEREE: It's not your money. This is the case where the creditors are not taking the beating they usually do for losses.

MR. LIPSON: I am coming to that and I recognize the creditors are sitting idly by waiting for somebody to bail them out.

I listened very carefully to Mr. Schaeffer's presentation, and it seemed to me that the entire crux of his refusal to go along with anything with the debtor is that there is an impasse involving the use of the New York office, which has a substantial loss, and the exact words from Mr. Schaeffer was the impasse between the debtor and the Fund.

Now, it seems to me that is the only impasse. I think in the interests of all concerned perhaps the Court could direct that the New York office be eliminated so we could save money.

THE REFEREE: That was the point of the hearing last time we were together.

MR. LIPSON: I realize that. But the impasse is still existing.

Do I take it, Mr. Schaeffer, if they give up the New York office, the impasse will be avoided?

MR. SCHAEFFER: The position of the Fund is to conduct a business as economically as possible. It is not the position of the Fund to close things down arbitrarily.

There are things taking place in the New York office that are absolutely needed toward the operation of the firm. The Fund is not opposed to their continuation. The Fund is opposed to paying three, four thousand dollars a month rent when we could get along for $800 a month rent.

The Fund is opposed to certain excess salaries. It is not trying to impose its will upon these people. But if there was cooperation and if those unnecessary overhead items were reduced to a point where we would be near a break-even point, the Fund would be agreeable to continuing for a reasonable additional length of time to try to work out what now appears to be these insurmountable problems.

MR. LIPSON: With that explanation I dare say, if your Honor please, that I think it's important that a short adjournment be given to everybody here so perhaps we can work this impasse out and bring it to a conclusion because if this thing falls on its face, I dare say nobody is going to make anything out of this thing. The Masmo operation -- the only asset will be lost on the Masmo part and the Fund, of course, will take a terrific beating insofar as the other assets are concerned.

So I think if we can survive a short period of discussions and I think even the Court upon a proper presentation can direct that the debtor do this, that and the other thing -- the Court doesn't have to sit idly by and wait for something to happen when the only impasse is excess expenditures and unnecessary expenditures.

THE REFEREE: Where is the accountant?

MR. EHRENBERG: We are here, sir.

THE REFEREE: I think we might hear from the accountant on the operations.

MR. ITZLER: May I be heard on one item that was mentioned by Mr. Schaeffer.

I want to make it perfectly clear to the Court that Messrs. Horvath and Neisco are in agreement that the New York overhead should be cut.

THE REFEREE: When?

MR. ITZLER: Let me just report to the Court items that have taken place between the last time we were here and today.

Firstly, one of the employees was dropped.

THE REFEREE: Who?

MR. ITZLER: Esmerelda Pinto. Her salary is $120 a week.

A telephone call was occasioned -- I don't know who made the call -- between Mr. Horvath and Mr. Rugendorf, who you heard testify last week. Mr. Horvath said to Mr. Rugendorf, "Sir, I do believe that we have too much space. Since you are going to be operating Neisco and since you have to be happy with new space, would you come and meet me so that we can look for new and reduced space?"

Mr. Rugendorf said, "Let's leave that up in the air until September 30."

We are very willing to immediately reduce our overhead with regard to the rental, which is the largest single item.

THE REFEREE: How come you weren't prepared to do that last time?

MR. ITZLER: We were. I think I made that statement on the record.

THE REFEREE: That's not the largest single item. That's $3,000. The salary of the two gentlemen is about $8,000 a month. That's the largest, as I see it.

MR. ITZLER: But we believe that we convinced this Court last week that the salaries of the two major officers are absolutely necessary.

THE REFEREE: Do you have a choice? Mr. Schaeffer says he's finished and if I take testimony as to losses in September and as to losses in October, I am going to impose indemnity. I told you last time one of the main reasons for my not eliminating the salaries of the two Horvaths -- I don't like to leave people without sources of income -- is the fact that if losses continue, I would impose indemnity for September and October.

MR. ITZLER: That is not even the gist of our argument, your Honor. Our argument is that this would be a rudderless ship without executives. To take away executives, a ship can't run. These executives would have to be replaced and salaries would have to continue. It's just a question of to whom it is being paid.

THE REFEREE: Now, Mr. Schaeffer, let me understand. If I direct indemnity now, whether it comes from you or from some other angel or from I don't know where and they can't post it, how does that square with the Pension Fund. You are in for everything. You pick up all the marbles that are around. They may not be worth very much. Is this what you are pressing for? I had understood you to have pressed for it and I am not using this indemnity hearing as a blackjack. Let me make it plain.

Frankly, it makes no difference to me at all whether this company adjudicates or not. I figure eleven months in Chapter XI is enough at $40,000 a month losses.

MR. SCHAEFFER: I think a very direct question requires an answer because the Fund is a very misunderstood institution in this particular case.

The difference in salvage value to the Fund between a going business and one that will liquidate out at public auction is the difference between night and day.

THE REFEREE: I understand.

MR. SCHAEFFER: The Fund has been striving, has been listening to all kinds of demands which under normal circumstances it would not have the patience to listen to, in an endeavor to have a greater salvage.

The Pension Fund is still willing. I lend my efforts to it. I have urged these people, I have pleaded with them, God alone knows why, your Honor. It is they who should be coming to us and asking us for time.

THE REFEREE: Apparently they are quite adamant.

Let me ask the question: shall I adjudicate today? Will that be to the interests of the Fund, plain and simple? Yes or no?

MR. SCHAEFFER: No, your Honor.

THE REFEREE: Then why did you have us spin our wheels all morning long?

MR. SCHAEFFER: Because if you adjudicate a few days hence when we have had an opportunity to get prepared to take possession, then we are prepared to pick up our marbles even though it represents a lesser salvage.

THE REFEREE: Then you are prepared for an adjudication?

- - -

THE REFEREE: Neisco, Inc. Wasn't this the date or yesterday was the date --

MR. ITZLER: Yesterday was. By order of this

Court the debtor was required to post from outside sources an indemnity of $25,000 to insure creditors against losses that were sustained in September retroactively and future losses.

The debtor has failed to deposit that $25,000. The order states that the Court today would make a determination as to what steps should be taken with regard to the debtor by virtue of its failure to deposit the 25,000.

With respect to that, your Honor, I respectfully urge the Court that the time within which the debtor be required to deposit the indemnity be extended to the 19th of this month and that we meet again here on the 20th to again determine what should be done if the debtor does not deposit the $25,000.

MISS FREIMAN: Your Honor, I would inquire what is going to change between now and the 19th.

MR. ITZLER: If you permit me to finish -- I don't interrupt you, Miss Freiman.

On the 19th of this month representatives of the Pension Fund will be meeting in New York to discuss this problem as well as others totally unrelated.

THE REFEREE: Well, they were here when I fixed the indemnity. I don't see why --

MR. ITZLER: Well, Mr. Radom will return with at least one member of the board I am told, the Pension Fund Board and another I guess it is general counsel to the Pension Fund and they will be meeting in Mr. Schaeffer's office.

I have been asked by Mr. Schaeffer to remain available on that day to meet with the Pension Fund if they so require.

I am prepared or will be prepared on that day to present to the Pension Fund a program of economy which would include --

THE REFEREE: It is a little late for that.

MR. ITZLER: Which will include a decrease, a proposed decrease in the salaries of George and Ernest Horvath.

THE REFEREE: A complete decrease?

MR. ITZLER: A decrease.

THE REFEREE: How much?

MR. ITZLER: $250 each, sir.

THE REFEREE: A week?

MR. ITZLER: That is correct.

THE REFEREE: That is 2,000 a month?

MR. ITZLER: That is correct.

-- -

THE REFEREE: Where will the monies come from?

MR. ITZLER: From the Pension Fund.

THE REFEREE: Let me hear from Mr. Vogel. I didn't understand the last time we were here, Mr. Vogel, that the Pension Fund was prepared to have me fix indemnity with the understanding that it was going to come from you.

I understood that you were pressing for indemnity so that your losses would be reduced for those two months. Is it a fact that you are going to pick up the losses?

MR. VOGEL: Well, your Honor, your position is correct; nothing has changed from that time or from any time.

The Fund has always been and continued to state that it does not want to incur any further losses; that at the same time it would be better if a plan could be arranged.

THE REFEREE: Naturally it would be better for all concerned including the government, but the point is, is your Fund prepared to post this indemnity on behalf of the debtor?

MR. VOGEL: No, your Honor.

THE REFEREE: Fine. Then Mr. Itzler, tell me what is going to happen as Miss Freiman asked you by next week. Where will the money come from?

MR. ITZLER: Well if I may, I can answer that question indirectly if I may, your Honor.

Although it has never been proven by testimony, although there has never been any real evidence introduced to indicate this, I think it is understood by most or all of the parties to this proceeding that all of the assets of this estate are validly liened by the Pension Fund, that in the event there is a diminution of the value of this estate, it directly diminishes the value of the security held by the Pension Fund.

Consequently, any loss that does accrue here by virtue of operations directly goes to the Pension Fund and its equity in this proceeding.

THE REFEREE: Well, they have had enough.

MR. ITZLER: Well if your Honor please, the Pension Fund may or may not have -- I am not quite certain myself -- may or may not have induced the Court's sua sponte decision to impose indemnity but I feel --

THE REFEREE: I don't make decisions sua sponte. I took a hearing on indemnity under the statute and concluded that there were losses.

The only question is whether I have reached the point of insisting that indemnity protect against those losses. You have had losses straight through here.

MR. ITZLER: The only point I am trying to make, sir, is that if indemnity is posted, it is posted for the protection of the Pension Fund and if the Pension Fund itself is ready, willing and able to forbear on that particular imposition by the Court, then the Court should see fit to permit the debtor to continue to work with the Pension Fund and the various other parties to the proceeding.

THE REFEREE: What you ask me is to recede from the order posting indemnity.

MR. ITZLER: That's not what I ask.

THE REFEREE: That's what you are saying. You are telling me that the Union Fund should forbear.

MR. ITZLER: What I am asking is this, sir, and I will make it very clear.

You have held a hearing and you have made a determination. Rather than have to have another hearing and have another determination, the order and record should stand but I am asking the Court to extend from time to time if the Pension Fund consents, the requirement to post the indemnity hoping that in that interim period from time to time, No. 1, we will satisfy the Fund and the Court that losses can be cut by the reduction of overhead.

THE REFEREE: By what, $2,000?

MR. ITZLER: No, sir, I told the Court that we are going to make a proposal to cut expenditures and hopefully during that period of time we can consummate the plan that we have moved along to.

THE REFEREE: I have been listening to this now for six months, Mr. Itzler. This arrangement was filed back in May or April.

THE REFEREE: If I understand it, the moment Internal Revenue Service says okay, we will buy, you people are ready to go; is that the idea, Mr. Vogel?

MR. VOGEL: That is not the idea, your Honor.

THE REFEREE: What then holds me up?

MR. VOGEL: As I said before, your Honor, there are a number of things that are moving simultaneously.

THE REFEREE: I take it you are going to work those out on your end?

MR. VOGEL: We are and we have been.

THE REFEREE: That's purely contractual.

MR. VOGEL: When those are done or it's cleared those cannot be done, we will be in here faster than anyone will believe asking the Court to adjudicate.

THE REFEREE: Let me get the first thing out of the way since that may be the problem. Let's see how fast we can get the government to go along. Let's see how fast we can get the stipulation at least ready for execution.

MR. ITZLER: I suspect, your Honor, we will have completed the other tasks before the government is completed.

THE REFEREE: No. That's just a suspicion. I want this out of here very quickly, Mr. Vogel, Mr. Itzler, one way or the other, either carry the corpse out or revive it. But I want it out.

What about getting the acceptances so I can close the first meeting, Mr. Weinberg?

MR. WEINBERG: As far as the information I have, your Honor, our original agreement stands pat. We cannot turn over acceptances until we have the money that was agreed upon.

MR. ITZLER: I wonder whether that's really a crucial item. If we agree on all of the other items, the $50,000 that has to go to the creditors' committee will be included.

THE REFEREE: Along with a lot more, it seems to me.

MR. ITZLER: It will all be included and closing the first meeting is merely a ministerial task and I really don't think that that's the crucial item here.

MR. VOGEL: For the Fund to give up nothing is gained all around. I think to the extent that we can work out an arrangement here, your Honor, it should be done. If it cannot be done, it just cannot be done. But I don't think that at this point when everyone truly is working toward one end --

THE REFEREE: Miss Freiman, have you heard from Mr. Franklin?

MISS FREIMAN: He will be over very shortly.

MR. VOGEL: Please don't discount the fact that everyone in good faith is working toward a solution here. They really are. I think I represent that on my own knowledge.

THE REFEREE: I have no doubt that everyone is, but whether they are really doing anything constructive I don't know.

MR. VOGEL: I agree with you there, too, that I don't know --

THE REFEREE: For months I have been told one way or the other by someone either there are problems to work out or we are ironing out things or there are loose ends to be tied. It all adds up to the same thing.

MR. ITZLER: But until Mr. Horvath voluntarily withdrew we were --

THE REFEREE: I would hate to think this confirmation depended on his salary and his getting out.

MR. ITZLER: I might honestly say that was a very big problem.

THE REFEREE: Let's confirm.

MR. ITZLER: Now that he has withdrawn we are actually working with the Fund in hand for the first time.

MR. ITZLER: I can only say this.

THE REFEREE: Let me hear from Mr. Vogel. Maybe he can give me a clue as to how I can break this log jam.

MR. VOGEL: Believe it or not, Judge, we are on the same track you are. We want to move this case as fast as you do.

THE REFEREE: Tell me what's holding you up and I will get them moving. What is it, who is it?

MR. VOGEL: In all frankness I could tell you we are working as fast and as hard preparing agreements.

THE REFEREE: Of what nature?

MR. VOGEL: As you know, your Honor, there are a number of entities involved here, including Neisco. The Fund has outstanding loans to Momarte. It has a great superstructure of corporations which sit on top of all these operating corporations. We are trying our very best to work out a way in which the Fund's assets are protected.

THE REFEREE: When will you do this?

3) MR. VOGEL: We are doing this every single day of the week, your Honor. We have Mr. Fisher's offices preparing agreements which are promised to us momentarily. The minute we get them we will review them and come back and give them our comments. We are ourselves preparing all the agreements with respect to Neisco. We have met with Masmo's trustee constantly.

THE REFEREE: Do you think I might get luckily finished with those loose ends by the end of the year?

MR. VOGEL: Let me put it this way, your Honor. The Fund will not sit by and continue to lose money.

THE REFEREE: But you are.

MR. VOGEL: We have asked -- and I personally asked -- Mr. Itzler this morning, when we were talking about asking the Court for an adjournment, to put it -- he said two weeks, and I said no, not two weeks. One week, the 12th, because my client --

THE REFEREE: What's going to happen on the 12th? Who is going to put up the $25,000?

MR. VOGEL: On the 12th it is my hope we will know better at that point. Each day that goes by is producing some good results. If they do not and your frustration is an accurate frustration, we are going to pull the plug.

THE REFEREE: Why don't I do this. Why don't I do it right now. I am going to adjudicate for failure to post indemnity and I will stay the order of adjudication until next week and then we will see and maybe that's the answer here.

MR. ITZLER: Your Honor, I don't know that that's the answer.

THE REFEREE: You got a better one?

MR. ITZLER: The only better answer --

THE REFEREE: They want their indemnity, if I understood them.

MR. ITZLER: No. They share the same feeling that I do and everybody else. Every day that goes by costs the Pension Fund money in that its equity is being reduced by losses. The Pension Fund is very anxious to stop this, to get this done with and finished, and the Pension Fund, as one party to a number of agreements, is working with the other parties to get these agreements promulgated and effective. As soon as they are promulgated and effective the money will be forthcoming. We will confirm the arrangement and everybody will be out.

THE REFEREE: How long will it take for those agreements?

MR. ITZLER: That's the question. That's unanswerable. That's the question I can't answer.

MR. VOGEL: From the beginning we have told your Honor that we think it will take two to three months to have this deal wrapped up, which is why we originally said that we would like the expenses of Neisco reduced a near break-even point. We are working toward that right now, your Honor. Mr. Horvath has gotten off the payroll. I am told they are daily reducing the expenses.

THE REFEREE: Like how?

MR. VOGEL: Mr. Horvath can best tell you how they are doing that right now. But there has been a good-faith effort to reduce the expenses. They are curtailing the operations of the New York office to try and bring that loss down. At that point we would have the ability, without that pressure and the loss, to work out a plan, two to three months to work out a plan.

THE REFEREE: Neisco, Inc.

Do I get indemnity or do we continue to adjourn?

MR. ITZLER: We did not. We failed to post indemnity, your Honor, the reason being that our source of funds, to wit, the Pension Fund has not seen fit as yet to make available to us not only the funds for indemnity but the funds to confirm the plan.

However, the past two weeks have been used most constructively. Mr. Schaeffer's office has met on numerous occasions with Mr. Douglas' office, with Jack Polish and with myself with regard to working out the intricacies of having the money advanced. I think I can say with the utmost candor that we have moved much further in the last two weeks than we have in any comparable period of time today.

With that in mind I respectfully ask that the Court grant us an extension of time within which to post the indemnity required to November 12th. I believe that the Pension Fund will join in my application.

MR. VOGEL: We do, your Honor.

THE REFEREE: Looking beyond the question of posting the indemnity, where are we going on this whole arrangement?

MR. ITZLER: If we can work out the problems which seem to be being worked out, we will be able to have a commitment from the Fund for the funds neçessary to confirm this arrangement.

THE REFEREE: When? I want to move it.

MR. ITZLER: May I just have a moment off the record.

(Discussion off the record.)

MR. ITZLER: I am advised, if your Honor please, by counsel for the Fund that if agreements are worked out between now and the 12th which would enable the Fund to advance monies --

THE REFEREE: What agreements?

MR. ITZLER: There a number of people that are involved in this, your Honor, and a number of different ancillary problems that bear upon the Fund's advancing of money.

THE REFEREE: How long am I going to carry this?

MR. ITZLER: I hopeonly so long as the Fund permits us to.

THE REFEREE: How long?

MR. ITZLER: I know the Fund is working diligently toward completing this.

THE REFEREE: This thing is very ambiguous. I had understood the problem was the Internal Revenue Service.

MR. ITZLER: That still is a problem.

MR. SCHAEFFER: We hope so.

Maybe I can summarize the position of the Fund in this matter.

THE REFEREE: Yes.

MR. SCHAEFFER: While it does not have the standing before this Court as operators of the business of the debtor, it is paying the bills. In its opinion, contrary to the opinion of Mr. George Horvath, the overhead in New York is unnecessary and inflated to the extent of upwards of 50 per cent.

The elimination of that unnecessary overhead would have brought us down to a near break-even point, permitting the Fund to continue negotiations of a host of problems, looking toward the confirmation of the plan of arrangement of Neisco, looking toward an arrangement reached with the trustee in bankruptcy of Masmo, whose affairs are interwoven with the Neisco affairs and, frankly, although not the matter before this Court, looking to an adjustment of a host of problems with respect to another property owned in common by the parent corporation.

The Fund expects the New York operation to be phased out in a manner satisfactory to itself in order for it to continue to finance the debtor-in-possession's operations during this period of time needed to bring about these agreements I have enumerated.

This phasing out, no one at this moment knows the exact details. It may include the discharge of one or more other employees. It probably will include the rental of other space, less expensive than the present space, but it will, in the opinion of the Fund, eliminate approximately 50 per cent or more of the $23,000 being spent by the New York operation.

If the parties involved agree to this procedure the Fund is prepared, insofar as its consent is needed by this Court, for an adjournment, is prepared to consent to extend the time of the debtor to file the $25,000 indemnity for an additional two weeks' time, which two weeks will be very constructively employed in trying to work out the multitude of these problems.

I am asked, your Honor, to make mention of the fact that various representatives of the Fund visited with me at my office. The Fund is comprised of 16 trustees. A very small number were present yesterday. There was made known to us the recommendation of this Court with respect to the claim of the United States Government on the theory that the United States Government will reduce its claim filed against Neisco to that portion which is directly attributable to the payroll taxes of Neisco, the proposed arrangement being that should the plan be confirmed, the settlement or the payment in full of the claim of the government will be extended over a period of ten years by paying $100,000 down on the date of confirmation with the certificate of deposit and the balance had originally been offered to be paid off over a period of ten years in equal annual installments.

This Court then made a suggestion that the first two installments be increased to $50,000 per year and the balance then remaining, it was recommended, be paid over in eight additional annual equal installments and the first two installments of $50,000 annually to be guaranteed to the United States Government by the Fund.

The persons present in my office yesterday, being of the Fund and representing the Fund, have unanimously agreed to go along with that recommendation and to recommend it to the board of trustees, and so that matter is now in the process of being agreed to.

It is my sincere hope that the Fund will agree to your Honor's suggestion.

BEST COPY AVAILABLE

MEMORANDUM AND ORDER OF HAIGHT, J.

File

U.S. DISTRICT COURT
FILED
JAN 12 1977
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x

BALLON, STOLL & ITZLER,

Plaintiff,

-against-

THOMAS J. DUFFEY, HERMAN A. LEUKING, JR., ALBERT D. MATHESON, WILLIAM J. KENNEDY, JOHN A. MURPHY, JACK A. SHEETZ, JOHN SPICKERMAN, FRANK E. FITZSIMMONS, ROBERT HOLMES, DONALD PETERS, WILLIAM PRESSLER, ODELL SMITH, ROY L. WILLIAMS, FRANK H. RANNEY and JOSEPH MORGAN, not individually, but as Trustees under a Common Law Trust of the Central States Southeast and Southwest Areas Pension Fund,

Defendants.

- x

72 Civ. 2916-CSH

MEMORANDUM AND ORDER

Appearances:

BALLON, STOLL & ITZLER
Attorneys for Plaintiff
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New York, New York 10036
Kenneth S. Knigin, Esq.
Morrell I. Berkowitz, Esq.

GREENBAUM, WOLFF & ERNST
Attorneys for Defendants
437 Madison Avenue
New York, New York 10022
Laurence Vogel, Esq.
Sydney J. Schwartz, Esq.

HAIGHT, District Judge:

Plaintiff law firm Ballon, Stoll & Itzler ("BSI") sues to recover compensation for legal services. The defendants Thomas J. Duffey et. al. are the Trustees of the Central States Southeast and Southwest Areas Pension Fund (hereinafter the "Fund"; the defendants shall be referred to as the "Trustees"). Jurisdiction is founded on diversity of citizenship.[1]

BSI specializes in bankruptcy law. The services forming the subject matter of the action were rendered in respect of Chapter XI proceedings in this court involving a corporation called Neisco, Inc. ("Neisco"). BSI acted as attorneys for Neisco in the Chapter XI proceeding, which was filed on November 24, 1969. No plan of arrangement was concluded, and Neisco was adjudicated a bankrupt on March 22, 1972.

The case was tried to the court without a jury on the question of liability only, with the amount of BSI's compensation (assuming liability on the part of the Trustees) being reserved.

I.

Plaintiff's Contentions

BSI's amended complaint contains three causes of action.

The first cause of action proceeds in contract. BSI alleges that, in consideration of its undertaking to render all legal services in respect of Neisco's Chapter XI petition, including acting as attorneys for Neisco as debtor-in-possession and proposing an arrangement with creditors, the Trustees promised to pay BSI the reasonable value of said services. BSI contends, as it must in view of Neisco's ultimate adjudication, that a successful Chapter XI arrangement was not a condition precedent to its right of compensation by the Trustees. The reasonable value of BSI's services is alleged to be $75,000, of which $25,000 has been paid, leaving a balance of $50,000.

The second cause of action sounds in fraud, alleging that the Trustees warranted and represented to BSI that they would take the steps and furnish the funds necessary to confirm a Chapter XI arrangement, including the payment of legal fees; that BSI relied on these representations; that they were falsely and fraudulently made; and that the Trustees never intended to provide the funds required for confirmation.

The third cause of action, reverting to contract theory, alleges a breach of contract by the Trustees in failing to furnish the funds necessary to confirm a Chapter XI arrangement.

Defendants' Contentions

First, the Trustees flatly deny that they obligated the Fund to pay any compensation to BSI in respect of the services alleged in the complaint, or that they made the representations, warranties and promises alleged.

Second, the Trustees contend that BSI is estopped from claiming any compensation because of its failure to disclose, at the time of its petition to the bankruptcy court authorizing its retention as attorneys for the debtor-in-possession, the very agreement with the Trustees and Fund upon which BSI alleges.

Third, the Trustees contend that this court has no jurisdiction over them. BSI relies upon the New York Long Arm Statute, N.Y.C.P.L.R. §302, which the Trustees argue does not apply.

II.

Findings of Fact

Evidence at the trial was given by Frederick E.M. Ballon, a senior partner of BSI; Ronald S. Itzler, another partner; and Jack Polish, an attorney not affiliated with BSI. The Trustees called their special attorney Joseph S. Radom as a witness, and offered depositions of two Trustees, Messrs. Duffey and Matheson. Both sides introduced numerous exhibits, including portions of transcript of proceedings before the bankruptcy court.

The narrative begins in November, 1969.

Ballon, a senior partner of BSI, and his firm had for many years represented one George Horvath, who in turn, together with other members of his family, controlled a number of corporations, Neisco being one of them.

The Trustees had been persuaded, over a considerable period of time, to lend several millions of dollars from the Fund to the Horvath corporations. In early November, 1969, Neisco alone owed the Fund about $1,500,000; the other Horvath corporations owed several more millions. Horvath desired to borrow more money from the Fund for Neisco, which was engaged in the textile fabric business, and was encountering continued economic difficulty. Horvath calculated that he needed another $1.25 million to $1.3 million to transfuse into Neisco. At Horvath's request, Ballon telephoned Joseph Teitlebaum, the general counsel of the

Fund, to arrange a meeting in Chicago, the headquarters of the Fund.

On November 5, 1969, Ballon and Horvath went to Chicago. They were accompanied by Jack Polish, an attorney who also represented Neisco and the Horvaths, although not affiliated with BSI. On November 5, a meeting took place in the offices of one Allen Dorfman, a general advisor to the Fund. Ballon testified that, in addition to Horvath, Polish and himself, the following were present: Teitlebaum; Joseph S. Radom, an attorney and bankruptcy specialist representing the Fund; and three Trustees, including Matheson and Duffey.

Messrs. Ballon and Polish have testified, on behalf of BSI, that the Trustees, speaking for the Fund, strenuously urged upon Horvath the necessity of making Neisco the subject of a Chapter XI proceeding. The Trustees, during the trial, appear to suggest otherwise; but I find, on a preponderance of the credible evidence, that plaintiff's account on this issue is correct. Surely it accords with common sense. By virtue of its lien security arising out of the original loans, the Fund could have foreclosed Neisco, lock, stock and barrel, at any time it chose. The Fund was faced with the melancholy task of foreclosing a failing debtor and suffering substantial loss, or investing further monies in the hope of restoring the debtor to economic health. The risk arising out of the latter course of action was that the Fund might be casting good money after bad. It was to avoid or minimize this risk that the advisors to the Fund insisted upon a Chapter XI proceeding, since within that particular context additional loans could be made by the Fund to Neisco pursuant to court order and supervision which would furnish an added element of security. Horvath resisted the Chapter XI concept, with the accompanying lessening of his own control; but he bowed to the inevitable when it became apparent that this was the only alternative to foreclosure.

Ballon testified that, at the November 5 Chicago meeting, the Trustees present inquired not only as to the amount of new money Horvath would require to keep Neisco operating, but also as to the overall costs of a successful arrangement. In this latter regard, consideration had to be given to settlement with the United States, which had a substantial tax claim; settlement with general unsecured creditors; and legal and court costs, including the fee of the attorneys who would serve on behalf of the debtor-in-possession. It is the testimony of Ballon, corroborated by Polish, that specific discussions were had with respect to the BSI fee, in the event that firm acted in that capacity.

Mr. Radom, who as noted attended the meeting on behalf of the Trustees and the Fund, testified that no inquiry concerning legal fees was made at that meeting, and that compensation was not discussed.

Again, I find on the basis of the preponderance of the credible evidence, and in keeping with concepts of common sense, that the cost of a Chapter XI arrangement, including the legal expenses which inevitably accompany such proceedings, came up at the November 8 meeting. I further find, as Ballon testified, that the subject was again discussed at a subsequent meeting in Chicago on November 18, attended by Horvath, Ballon, Teitelbaum, Radom, Dorfman and two Trustees. In making this finding, I need not choose sides between the testimony of the distinguished professional witnesses who appeared before me. Minutes of the Trustees' meetings and discussions are in evidence, as attachments to defendants' answers to interrogatories. The first pertinent entries appear in the minutes of a 'conference call' involving a number of Trustees, together with Messrs. Dorfman, Teitelbaum and Radom, on November 21, 1963. The following entries appear:

> "The Welsco and Wasmo accountants have told us it will take an investment of $1,500,000.00 for inventory and working capital plus $155,000.00 voted last week. The difference between that and $1,500,000.00 is what they are asking for to be voted to keep this mill operating. They will have to close if they don't come up with this money. He is going into Chapter 11 proceedings. He will be accounted to the Fund for this money. Mr. Rugendorf will be co-signator on the checks. All delinquent debts will be frozen. Attorney Joseph Radom will approve. Current items of operation is the only thing that can be paid. Attorney Radom and Teitelbaum feel that there is no way of eliminating the risk for the future...
>
> "Horvath will have to go into Chapter 11 proceedings and will freeze all debts. Anything he discusses will have to be under supervision of court. Mr. Teitelbaum reported that this property is without working capital and will require about $1,350,000.00 in addition to the $155,000 that was recently voted. All checks and financial matters will be subject to our control and our man will countersign. It is impossible to know exactly where the $1,350,000.00 could be lost. The first group voted to put in this man but will make determination of what is feasible."[2]

The picture that emerges from these minutes is that of the Fund concluding, no doubt with some reluctance, to advance considerable additional monies to Neisco, but with the salvage operation to be conducted under the careful supervision of the bankruptcy court and the Fund's own legal advisors. The Fund was, naturally and properly, cost conscious in contemplating this venture; and it is only logical to assume that, when the Chapter XI alternative was first considered at the November 5 meeting with Ballon and Horvath, all elements of cost, including legal costs, would be discussed. In this context, the evidence makes it clear that the Fund would be the ultimate source of payment for legal costs in the event of a successful Chapter XI arrangement, since Neisco, in a failing condition and badly in need of transfusion, was not in a position to do so, and neither the United States nor the general creditors could reasonably be viewed as likely prospects.

I find, therefore, that the subject of legal costs, including attorneys' compensation, came up at the November 5 meeting.

On the issue of what precisely was said, I have only the plaintiff's account to consider, since, as noted, defendants contend that no discussion took place, and accordingly put forward no version.

Mr. Ballon testified that at the November 5 meeting, Trustee Matheson inquired what amounts would be necessary to fund a Chapter XI proceeding, in addition to the amount of $1.3 million which Horvath calculated he needed to revive the Neisco operation. I find, in accordance with the testimony of Ballon and Polish, that Ballon responded to this inquiry by estimating the settlement that might be negotiated with general unsecured creditors (15 cents on the dollar, or about $75,000); stating that the Internal Revenue Service would probably require the payment of a comparable amount up front, and that the balance of the Government's claim would have to be negotiated; estimating the fees of the attorneys for the creditors' committee at $25,000; and estimating miscellaneous court costs at $4,000-$5,000.

On the subject of BSI's own fee, if it acted as attorney for the debtor-in-possession, Ballon testified that his firm would require a retaining fee of $25,000; and that, in respect of the balance of the fee, two alternatives presented themselves: (1) if an arrangement was successfully completed, BSI could apply to the bankruptcy court for the fixing of compensation; but (2) if BSI's compensation was paid "through third parties", such as the Fund, an additional $75,000 would be regarded as sufficient. I accept Ballon's testimony that such a discussion was held and find accordingly.

At the conclusion of the November 5 meeting, the Trustees present indicated to Ballon, Polish and Horvath their assent to the institution of Chapter XI proceedings. They also stated, however, that they wished the Fund's own auditors to look further into the Neisco situation.

Horvath, Ballon and Polish returned to Chicago on

November 19, 1969 for a further meeting. They testified that it was attended by Dorfman, Teitlebaum, Radom and two Trustees. Radom testified that he does not recall attending a second Chicago meeting. I do not find it necessary to resolve the issue. At the meeting, Horvath, Ballon and Polish were advised that, according to the report of a Fund accountant, Horvath's original presentation had been inadequate, and that Neisco needed an additional $1.6 million to have any prospect of recovering operational health. Ballon testified, and I find, that the Fund's representatives indicated a willingness to make this particular advance, pursuant to the terms of an appropriate bankruptcy court order. Ballon testified, and I find, that he again gave the Fund representatives the sort of Chapter XI cost estimates which had been presented at the November 5 meeting.

Horvath and Ballon were told at the November 19 meeting that the Fund would have overseers in New York, to make sure that the Fund's continuing investments in Neisco were properly protected. These overseers were identified as Sol Eisenrod and Irving Rugendorf. These gentlemen maintained offices in New York City.

In these circumstances, BSI prepared and filed in this court a petition for a Chapter XI arrangement on behalf of Neisco. The date of filing was November 24, 1969.

Reference was made supra to Ballon's request for a $25,000 retainer. In point of fact that retainer was paid; but not by the Fund. BSI received the $25,000 in a series of five

$5,000 payments made by Montmartre, Inc., the owner of a Florida hotel called the Montmartre. Montmartre, Inc. was another Horvath corporation.[3] As with Neisco, the Fund had loaned Montmartre considerable sums which were owing. The Fund held the mortgage on the hotel. Apparently as a consequence of the creditor/debtor relationship, the Fund's representatives had the power of countersigning Montmartre checks. Arrangements had also been made for Montmartre to pay Neisco's accountants, the firm of Wasserman & Tatem, $25,000 in a series of $5,000 installments. While the Fund undoubtedly had to approve these payments by Montmartre, it is clear from the evidence that the Montmartre Hotel operations provided the source of the payments. Thus Radom, on behalf of the Fund, wrote to Ballon on February 18, 1970 (D.Ex.G):

> "Mr. Albert Matheson [a Fund Trustee] has authorized the person who countersigns check on the Montmartre account to pay all the notes (in the aggregate amount of $25,000) held by Wasserman & Tatem. Therefore, as and when sufficient funds become available from the operations of the Hotel, periodic payments will be made."

While Radom's letter does not refer specifically to the Ballon $25,000 retainer, it is apparent from Ballon's letter to Radom of January 21, 1970 (P.Ex.6) that Ballon considered the arrangements made for payment to the accountants and to BSI as identical in nature. There was a delay in paying off these amounts because it was necessary for Montmartre's operations to generate sufficient revenue.

Radom's letter to Ballon of February 18, 1970 also says:

> "I know of no means by which the Pension Fund can sanction payment of fees to your offices, as suggested in your February 3rd letter."

That was a response to Ballon's letter of February 3, 1970 to Radom (D.Ex.L), which read:

> "Permit this to serve as a reminder that we await word from you with reference to the Fund's intentions regarding the financing of a Plan of Arrangement. In connection therewith, it would also be necessary for you to authorize me as to the limits of any such Plan.
>
> "I promised to advise you as to the fees we would require in order to enable us to file the remaining Petitions in Bankruptcy. I frankly believe that $5,000 would be an absolute minimal fee therein."

Radom testified that individual Trustees had no authority to bind the Fund, a common-law trust with eight union and eight employer trustees, to pay legal fees or any other amounts. There is no evidence to the contrary, and I accept his testimony.

BSI concedes that it has no written retainer or agreement from the Trustees or the Fund, obligating the Fund to pay legal fees to BSI.

The minutes of the Trustees' meetings for the pertinent periods of time do not reflect any such agreement.

As noted supra, BSI prepared and filed a Chapter XI petition on behalf of Neisco on November 24, 1969. On the same date, BSI obtained an order from Referee in Bankruptcy (as he then was) Babitt, authorizing the retention of BSI as attorneys for Neisco, the debtor-in-possession. The court's order recites its satisfaction "that said law firm and the members thereof represent no interest adverse to said Neisco, Inc., as debtor-in-possession, or to its estate, in the matters upon which they are to be engaged..." This order was supported by a petition executed by George Horvath on behalf of Neisco; and an affidavit of Ronald S. Itzler, a partner of BSI. The Itzler affidavit states in part:

> "Neither your deponent nor any member of the firm has any connection with the above named debtor, its creditors, or any other party in interest, or their respective attorneys, except as follows:
>
> "(a) Your deponent has prepared and filed the debtor's petition for an arrangement herein.
>
> "(b) Your deponent and the law firm, of which he is a member, has had considerable experience in similar proceedings, and has on various occasions, in these matters, represented both creditors and debtors, but does not represent any of them in this proceeding or in any matter relating to the indebtedness owing to them from the above named debtor.
>
> "Neither I nor any member of the law firm of which I am a member represents any interest adverse to the debtor-in-possession herein, or the estate of NEISCO, INC., debtor, in the matters in which we are to be engaged.
>
> "Your deponent's firm has represented the debtor since its inception. The principals of the firm have chosen to retain our firm in connection with their financial difficulties because of our representation of the debtor prior hereto and because of our reputation in the field of debtor rehabilitation."[4]

There is no reference, in the Itzler affidavit, to the obligation of the Fund upon which BSI presently relies, namely to pay BSI's legal fees in connection with the Neisco Chapter XI proceeding, regardless of its outcome.

BSI also prepared and filed schedules in the bankruptcy court for Neisco. These schedules (D.Ex.B) recite the payment to BSI of the $25,000 retainer, by way of the Montmartre notes.

There then ensued prolonged negotiations, involving a number of different interests, concerning the Neisco Chapter XI proceeding, as well as other matters arising out of the long-standing relationship between the Fund and the several Horvath corporations. Radom, representing the Fund, came to New York for a number of meetings with partners of BSI, primarily Ballon and Itzler. In addition, the Fund gave instructions to two individuals in New York to act as its representatives in respect of the Neisco operation. In view of the jurisdictional defense now put forward by the Trustees on behalf of the Fund, it is necessary to consider the precise instructions given by the Fund to these individuals, Messrs. Sol Eisenrod and Irving Rugendorf. At a pre-trial deposition (P.Ex.23), Thomas J. Duffey, a Trustee of the Fund, stated that Eisenrod, a businessman, had been "called upon as sort of a consultant in this Neisco matter." This testimony followed:

> "Q For what purpose did the trustees call him?
>
> "A I believe he had some experience in the textile industry also. In other words, besides being a general businessman with good business judgment, in our opinion, I believe he or someone in his organization had some knowledge of the textile industry.

"Q But what purpose was he to serve for the Fund?

"A His representative, or the man from his own organization -- I believe his name was Rugendorf.

"Q Ervin or Irwin?

"A I don't know.

"Q Is that R-u-g-e-n-d-o-r-f?

"A I don't know.

Mr. Rugendorf, as I recall, was physically put in attendance at the site of the plants, at least on a part-time basis, to oversee as our representative, the operation of the plant and to, I believe, co-sign checks that were drawn on the account.

"Q At the plants, which were where?

"A In North Carolina.

"Q And is Mr. Rugendorf in Mr. Eisenrod's office?

"A He is associated with Mr. Eisenrod. How I don't know, but we always considered him as being with Mr. Eisenrod." T.37-8.

Itzler testified that, in his contacts with Rugendorf subsequent to the filing of the Chapter XI petition, Rugendorf was concerned with the premises to be occupied in New York by Neisco; with the rent and the lease; with Neisco's overhead, and with the issuance of checks and payment of invoices.

Eisenrod would report personally to the Trustees in Chicago on the status of efforts to achieve a reorganization of Neisco, and also with respect to other aspects of the Fund's continuing negotiations with the Horvaths (see minutes of Board of Trustees, May 5, 1970).

I find that, during the period of time when a reorganization of Neisco was being actively considered, Messrs. Eisenrod and Rugendorf, on behalf of the Fund, concerned themselves with the details of the continuing Neisco business operation.

As for the Neisco reorganization, BSI undertook negotiations with the unsecured creditors. However, negotiations with the Internal Revenue Service and government counsel, with respect to the tax claims against Neisco, were conducted directly by Radom and the Fund's New York attorneys, BSI being kept advised of the progress of those negotiations. Itzler explained that the Fund attorneys undertook direct negotiations with Internal Revenue Service, because, if a plan of arrangement was accomplished, the Fund would be putting up the necessary money.

In a plan of arrangement filed by BSI on April 15, 1970, a payment to general unsecured claimants in the amount of 12-1/2% of their claims was proposed. At that time, no agreement had been reached on the government's priority claim (P.Ex.2).

During the early months of 1970, extended discussions also took place between partners of BSI, on behalf of the Horvath interests, and representatives of the Fund, primarily Radom and Eisenrod. Pertinent letters from BSI's files were admitted into evidence.[5] It is apparent that the Neisco proceeding was only one of several matters receiving the active, and concurrent, consideration of the Horvaths, represented by BSI, and the Fund, represented by Radom and Eisenrod. Thus Ballon's letter of March 30, 1970 to Eisenrod (P.Ex.8) puts forth a proposal "as a possible vehicle to be used to dispose of all existing problems"; the Neisco proceeding is then referred to, and so is the Montmartre situation, with Ballon suggesting a renegotiation of the mortgage currently held by the Fund. The initial proposals did not lead to agreement; on April 8, 1970 Ballon wrote to Radom (P.Ex.5), putting forward a different proposal which dealt with Neisco, and in addition the Montmartre situation, a suggested lifetime employment of George Horvath as a "consultant" by Montmartre at $52,000 per year, and the return to the Horvaths of life insurance policies which the Fund presently held on their lives. On April 21, 1970 Ballon wrote to Radom (P.Ex.4), reciting various agreements allegedly reached on the Neisco proceeding, pursuant to which the Fund would advance monies necessary to consummate an arrangement; reference is also made to the Montmartre situation and personal arrangements to be made for the Horvaths.

Finally, on July 27, 1970, Itzler wrote to Laurence Vogel, the New York attorney for the Fund, enclosing the drafts of three agreements, involving these several matters. Itzler's letter reads in part:

> "It is imperative that we get moving on the execution of these agreements, since the continued existence of Neisco depends upon our confirming a plan. The confirmation of the plan, of course, depends upon the execution of these agreements."

In point of fact, the agreements were never signed.

I find, on the evidence adduced at trial, that the Fund never intended a piecemeal settlement of the several ventures through which the Fund and the Horvaths were entangled with each other. Specifically, I reject BSI's contention that the Fund obligated itself to pay BSI's legal fees, whether or not a plan of arrangement was consummated for Neisco, and without any consideration to the resolution of the other questions involving the Fund and the Horvaths. I am not persuaded that certain statements made by Radom, during the two-year course of proceedings before the bankruptcy court on the Neisco and Masmo matters, are fatally inconsistent with the position presently put forward by the Fund, namely, that there had to be a settlement of all the Horvath affairs or none of them. I find that this represents an accurate statement of the Fund's intentions. I further find that the Horvaths, and BSI as their attorneys, were aware of the Fund's position.

The tale is almost told. At a hearing before the bankruptcy court on September 2, 1971, Mr. Vogel, speaking for the Fund, advised Referee Babitt that the Trustees had voted, at their last meeting, not to go forward and make monies available for a Neisco arrangement. The stated reason was that an individual had been indicted who was accused of taking a bribe from one of the Horvaths. Radom, who was also present, clarified the situation:

> "I think the record is clear--I made it abundantly clear on the record and to others involved in these proceedings that by reason of the indictment the Trustees were going to re-evaluate their position, and they have done so.

> "The plan envisioned the continued collaboration of the Fund with members of the Horvath family. By reason of the serious charges brought against a member by a consultant of the Pension Fund, it was decided this was not a course of action they decided to pursue."

Referee Babitt, having devoted considerable time to the case, was understandably irritated; however, there was in the economic circumstances no alternative to an adjudication in bankruptcy, which took place on March 22, 1972.

The Neisco Chapter XI arrangement having failed of achievement, there was of course no basis upon which BSI could make an application to the bankruptcy court for compensation as attorney for the debtor-in-possession. BSI forwarded an invoice dated May 16, 1972 to the Fund (P.Ex.10), setting forth its claim for legal fees of $100,000 and disbursements of $731.06, for a total of $100,731.06. Against that total, the prior payment of $25,000 from Montmartre is credited, leaving a balance allegedly due from the Fund of $75,731.06, for which amount suit is brought. The Trustees, on behalf of the Fund, deny any liability in the premises.

III.

Conclusions of Law

I first consider defendants' jurisdictional and public policy defenses.

Jurisdiction

As noted above, BSI claims jurisdiction over the Fund pursuant to the New York "long arm" statute, N.Y.C.P.L.R. §302, which provides in pertinent part:

> "(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> "1. transacts any business within the state;..."

The Trustees argue that the Fund's only New York activity was "coming into the state in a federal court to protect its rights against a New York petitioner in bankruptcy." To hold the Fund subject to New York jurisdiction in these circumstances, the argument proceeds, "would be an invasion of federal sovereignty to destroy the normal immunity which should attach to a nonresident exercising his federal rights" (Reply Brief, p. 9). While the Trustees acknowledge that they know of no case directly in point, reference is made to Thermoid Co. v. Fabel, 4 N.Y.2d 494 (1958), and to DuPont v. Bronston, 46 A.D.2d 369, 362 N.Y.S.2d 471 (1st Dept. 1974).

The Thermoid Co. case furnishes no illumination upon the case at bar. In that case, one Fabel, a resident of North Carolina, was indicted in this court for allegedly manipulating the accounts of plaintiff Thermoid Co. in order to defraud the Federal Government of taxes. Thermoid Co. was a Delaware corporation, of which Fabel had been president, a director, and a stockholder. Fabel surrendered to this court to plead to the indictment; he returned to North Carolina and then came back to New York for trial on the indictment; following a plea of guilty to one count and nolo contendere to other counts, he again returned to North Carolina and again came back to New York, this last time for sentencing. As he left this courthouse after sentencing, he was served with a summons and complaint in a New York civil action brought against him by his corporation. In these circumstances, the Court of Appeals held that the service of New York process upon Fabel would be set aside. The Court referred to the "ancient rule...that a suitor in attendance in a court outside the territorial jurisdiction of his residence is immune from service of civil process while attending court and for a reasonable time before and after, that is, going to court and returning to his home", 4 N.Y.2d at 499. The purpose of the rule, the Thermoid Co. case points out, "is to encourage voluntary attendance upon courts and to expedite the administration of justice"; Thermoid extends that rule to a criminal case, at least in circumstances where the defendant:

> "...who, learning that he has been indicted, travelled up to New York from his North Carolina home without arrest or process or other compulsion. His appearance in New York was in fact and in law voluntary. We should, therefore, on authority and principle, apply to him the immunity privilege and not the exception applicable in cases of compulsion only." 4 N.Y.2d at 499.

Having declared the application of "the common-law immunity rule", the Court of Appeals went on to observe:

> "And comity suggests we should carefully avoid interference with a privilege of the federal courts." 4 N.Y.2d at 500.

While in Thermoid Co. the defendant Fabel's attendance at this court could be regarded as "voluntary", the indictment itself was certainly not Fabel's idea; the criminal proceedings against him were initiated by the Government. In the case at bar, it is entirely clear that the Neisco Chapter XI proceeding was insisted upon by the Fund as a condition for any further economic transfusions that the Fund might make into Neisco. For that reason, the Fund's characterization of its actions as the protection of "its rights against a New York petitioner in bankruptcy" distorts reality. Such a characterization connotes a New York resident filing a bankruptcy petition in this court of its own volition, with an out-of-state creditor being obliged to come into the state for the sole purpose of protecting its rights in the bankruptcy proceeding. In the case at bar, the last thing the New York petitioner wanted to do was to file a petition in bankruptcy; Horvath's preference was that the Fund simply lend his corporation more money; and the Chapter XI proceeding ultimately commenced, while of course in the name of Neisco, was in fact initiated and insisted upon by the Fund.

It would be neither necessary nor appropriate to express a view, within the context of this case, as to whether the immunity rule would cover a nonresident creditor whose only contact with New York is to file a claim in a genuinely voluntary bankruptcy proceeding in New York, commenced by the debtor without the prior procurement of the nonresident creditor. It is sufficient simply to observe that the case at bar presents entirely different facts.

In DuPont v. Bronston, supra, the Appellate Division quashed a subpoena served in New York upon a nonresident who was present in New York "for the sole purpose of attendance as a suitor in the United States Tax Court". 362 N.Y.S.2d at 472. While in DuPont we may assume that the nonresident initiated the litigation which brought him to New York, his attendance in the courtroom of the Tax Court was, as noted, the sole purpose of his presence in New York.

In the case at bar, representatives of the Fund did much more than simply attend hearings, in the role of suitors, at the Neisco bankruptcy court proceedings. The Fund's designated representatives, Messrs. Eisenrod and Rugendorf, whose offices were in New York City, were active in overseeing the Neisco operation, both in New York and elsewhere, for the protection of the Fund's interests. Eisenrod and Rugendorf participated in negotiations and discussions with BSI within the context of the Neisco Chapter XI proceeding, the very proceeding which forms the subject matter of BSI's present suit. It is significant to remember that the Neisco bankruptcy proceeding did not start out as a straight adjudication in bankruptcy. Rather, for over two years Neisco was functioning as a debtor-in-possession, continuing to do business; and the Fund, acting through its representatives Eisenrod and Rugendorf, played a substantial part in the doing of that business. In these circumstances, the Fund was itself transacting business in New York, within the meaning and intent of N.Y.C.P.L.R. §302(a)(1). The statute applies to the transaction of business in New York by a nondomiciliary, "in person or through an agent". Eisenrod and Rugendorf were the Fund's agents for these particular purposes; the Trustees cannot distort the reality of the situation by labeling these individuals "independent contractors".

I hold that BSI has satisfied the requisites of the New York "long arm" statute, and deny the defendants' motion to dismiss the complaint on the basis of lack of personal jurisdiction.

The Public Policy Defense

At the time of the application for appointment of BSI as attorneys for Neisco as debtor-in-possession, practice in the bankruptcy courts was governed by the General Orders in Bankruptcy. General Order 44 provided in pertinent part:

> "No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied

> that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney."

The Trustees contend that, assuming arguendo (and without conceding) that the Fund had entered into the obligation to compensate BSI which BSI alleges, then the papers submitted to the bankruptcy court in connection with the retention of BSI as attorneys for the debtor-in-possession failed to comply with the requirements of General Order 44. Specifically, the Trustees argue that the alleged agreement in respect of compensation constituted a "connection" between BSI and the Fund, as Neisco's leading secured creditor, which Neisco as petitioner should have disclosed to the bankruptcy court at the time of application. The Trustees further contend that BSI's alleged agreement and relationship with the Fund necessarily gave rise to an "interest adverse" to general creditors of Neisco, since a primary responsibility of attorneys for the debtor-in-possession is to contest lien claims for the benefit of general, unsecured creditors.[6]

The testimony given at the trial followed predictable lines. Radom, a bankruptcy expert, testifying on behalf of the Trustees and the Fund, gave his opinion that BSI had violated General Order 44. Ballon and Itzler, partners of BSI and testifying on its behalf, testified that no disclosure was required, and that consequently no violation had occurred.

Itzler's explanation was that BSI had no "connection" with the Fund, as that word is used in the General Order; there was an "alleged contract", but that relationship, in his view, did not constitute a "connection". A "connection" would arise only if BSI represented the Fund, or if there was a conflict of interest between the Fund and Neisco, or between the Fund and unsecured creditors. Although Itzler recognized that the Fund was a lien creditor, he testified that lien creditors can be, but are not always, adverse to unsecured creditors. No conflict arises, on his theory, if the liens are in proper order and invulnerable to attack. In the present case, Itzler testified that he satisfied himself, by a full and complete search, that the Fund's liens were in fact valid.

Finally, BSI contends that any initial failure to disclose was cured by subsequent disclosures as the Neisco proceedings went forward. Specifically, BSI points to the disclosure, in the Neisco schedules, of BSI's $25,000 retaining fee, to be paid by notes of Montmartre, Inc.; and to repeated references in open court that the plan of arrangement was to be funded by the Fund.

I have no difficulty in concluding that, at the time of its application for retention as attorneys for the debtor-in-possession, BSI failed to make the disclosure called for by General Order 44.[7] To say, as does BSI, that its alleged contract for compensation with Neisco's leading secured creditor, in respect of the very proceedings at hand, does not constitute a "connection" with that creditor distorts the plain meaning of the language, and it is inconsistent with the salutary principle of disclosure.[8]

Nor am I persuaded that events subsequent to the retention order brought about full disclosure of the alleged contract, thereby curing a violation of General Order 44. Surely the disclosure in the schedules of Montmartre, Inc. as the source of BSI's $25,000 retainer is insufficient; Montmartre was a Horvath corporation, as was Neisco (although to be sure both corporations were indebted to the Fund). The references, during the bankruptcy court proceedings, to the undoubted fact that the Fund would provide the monies for an arrangement, if consummated, are equally insufficient as disclosure of the alleged relationship between BSI and the Fund, since they omit the significant factor that, on BSI's theory, the Fund was obligated to compensate BSI, whether or not the plan of arrangement went through.

I conclude, therefore, that BSI failed to make the disclosure required by General Order 44 at the time of its retention as attorney for the debtor-in-possession; and that such failure was not subsequently cured. But an additional question remains: Does such nondisclosure, on the basis of public policy, render BSI's alleged contract with the Fund void and unenforceable?

The Trustees argue that it should. But all the cases they cite deal with applications to the bankruptcy court itself, in which attorneys' requested compensation was denied, or a trustee surcharged, because full disclosure had not been made, or the requisite order had not been obtained.[9] These cases, in other words, were decided within the context of a proper distribution of the debtor's estate by the bankruptcy court, and did not involve, as does the case at bar, an alleged contract for compensation between attorneys and a third party such as a secured creditor.

Such a far-reaching sanction is not required by the express terms of General Order 44 which limits itself to providing, in the event of nondisclosure, that "the court may deny the allowance of any fee to such attorney..." Consequently, if BSI's present claim is to be barred as a consequence of nondisclosure, the basis must be found in some broader concept of public policy.

I decline to extend the sanctions of General Order 44 beyond its own boundaries. It is clear that New York law governs the right, if any, of BSI to compensation from the Fund.[10] Under New York concepts of public policy, contracts between private parties are rendered illegal by federal statutes only in a situation where "public policy as embodied in a Federal statute forbade the performance which was the subject of dispute", In re Exercycle Corp., 9 N.Y.2d 329, 335-6 (1961), discussing Matter of Kramer & Uchitelle, 288 N.Y. 467 (1942); and see Island Territory of Curacao v. Solitron

Devices, Inc., 489 F.2d 1313, 1320 (2d Cir. 1973).

In the case at bar, General Order 44 does not purport to forbid the performance of an agreement for compensation between attorneys representing a debtor-in-possession and a third party, such as a creditor. The General Order says only that, if the attorneys ultimately seek to obtain compensation from the estate, they must have made to the bankruptcy court the disclosure required by the General Order.

In these circumstances, I reject the Trustees' defense based upon public policy, and turn to the underlying merits of the action.

The Merits of BSI's Claims

The claims of BSI against the Fund for legal services, governed as they are by New York law, proceed in the first instance from §474 of the New York Judiciary Law, which provides:

> "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law..."11

In accordance with §474, the New York courts recognize that "ordinarily an attorney's compensation is governed by the contract between the parties, express or implied." Rodgers v. Sound of Music Co., 343 N.Y.S.2d 672, 676 (S.Ct.N.Y. 1972). Familiar principles of contract law apply. An express contract to pay an attorney compensation need not be shown, if the circumstances are such as to permit recovery "to be upheld upon the theory of an implied promise." Lynn v. Agnew, 179 A.D. 305, 166 N.Y.S. 274 (4th Dept. 1917), affirmed, 220 N.Y. 654. However, benefit conferred is insufficient, of itself, to sustain an attorney's claim for compensation:

> "Every act of Mr. Fisher as attorney was necessarily performed for his own client. The fact that others were benefited does not, in the absence of agreement by them, impose a liability upon them to pay." Matter of Loomis, 273 N.Y. 76, 81-2 (1937).

No valid contract for attorney's compensation exists where the other party lacked authority to contract. In re Romero's Estate, 131 N.Y.S.2d 559 (S.Ct.N.Y. 1954).

In the case at bar, BSI cannot sustain a claim against the Fund based upon an express contract. There is, of course, no written contract obligating the Fund to pay BSI for its services; BSI does not contend otherwise. There is no applicable statute of frauds, and so an oral express contract would be legally permissible; however, even resolving in BSI's favor all factual issues relating to Ballon's discussions in Chicago in November of 1969, those discussions fall short of establishing an express oral agreement, binding upon the Fund, to compensate BSI for the intended services in the Neisco Chapter XI proceeding. The most that can be said for those discussions is that certain Trustees asked Ballon what the costs of a successful Chapter XI arrangement would be, including attorneys' fees; that Ballon responded to that inquiry; and that the Trustees present then told him, in effect, to go ahead. This is entirely insufficient to give rise to an express agreement, binding upon the Fund to compensate BSI, no matter what the outcome of the Chapter XI proceeding. The language falls short of such an undertaking; and the several Trustees present at these meetings lacked the requisite authority to bind the Fund.

The question comes down, then, to whether the circumstances of the case, viewed in their totality, give rise to an implied promise on the part of the Fund to compensate BSI. I answer that question in the negative.

The evidence in this case compels the conclusion that BSI was retained by the Horvath interests; that its legal services throughout the pertinent times, including the Neisco arrangement and its negotiations on behalf of the Horvaths with the Fund on other matters, were primarily intended to further and protect those interests; and that no implied promise on the part of the Fund to compensate BSI arises in law.

A number of factors militate against the implication which BSI asks the court to draw. These include the following:

(1) The Fund clearly viewed a Neisco arrangement as part of an overall settlement of its tangled affairs with the Horvaths and their several corporations; the ultimate failure of the Fund's negotiations with the Horvath interests militates against an implied obligation on the part of the Fund to compensate BSI in respect of one of the several problems at issue between the principal parties.

(2) The Fund was not benefited in any manner by BSI's services.

(3) The individual Trustees with whom BSI was dealing lacked the authority to bind the Fund. The experienced and sophisticated partners of BSI could reasonably have foreseen that lack of authority; the implication of a binding obligation is more difficult when one deals with an entity such as the Fund, rather than with an individual party.

(4) Implication of such an obligation on the part of the Fund is rendered all the more difficult by Radom's express disclaimer, in his letter to Ballon of February 18, 1970 (D.Ex.G), of "means by which the Pension Fund can sanction payment of fees to your offices..."

(5) It is inherently improbable that the Fund would agree to compensate BSI in respect of an attempted arrangement, without regard to the ultimate success of the arrangement, since it was only by means of the arrangement (as opposed to liquidation in bankruptcy) that the Fund hoped to improve its own financial position.

Other factors may suggest themselves, but the foregoing is sufficient. I conclude, in sum, that BSI has failed to sustain the burden of proof it bore as plaintiff to demonstrate an implied promise to pay on the part of the Fund.

I hold that, in all the circumstances of the case, BSI undertook the Neisco Chapter XI proceedings in the hope that an arrangement would go through, and that the Fund, in the process of funding that arrangement, would generate monies for the purpose, *inter alia*, of compensating BSI as attorneys for the debtor-in-possession. The Trustees argue that, in embarking on that course of action, BSI ran the risk that the arrangement would not succeed. I agree with that contention. It frequently occurs that Chapter XI proceedings, commenced in good faith and with hope of ultimate success, fail of achievement, and liquidation results. It is the rule in the Second Circuit that, in such circumstances, attorneys rendering services to the debtor-in-possession in a proceeding under Chapter XI which has been superseded by an ordinary bankruptcy proceeding, may be awarded compensation out of the estate for legal services rendered during the aborted Chapter XI proceeding. In re Casco Fashions, Inc., 490 F.2d 1197 (2d Cir. 1973). Theoretically at least, that course would have been open to BSI in the case at bar, although perhaps the economic facts of life rendered the remedy of no value. But no provision of New York contract law or federal bankruptcy law remedies the fatal lack of proof, in the case at bar, of circumstances which require the implication of a promise by the Fund to compensate BSI.

I am mindful of BSI's contention that the arrangement failed of achievement because the Fund withdraw its support. That fact is not disputed. BSI seeks to invoke the rule that "one may not take advantage of a condition precedent the performance of which he himself has rendered impossible." Stern v. Gepo Realty Corp., 289 N.Y. 274, 277-8 (1942). But BSI attempts to raise itself by its own bootstraps. In each of the cases upon which BSI relies, there was in existence, beyond any dispute, a contract between the parties; the litigation concerned nonperformance. Thus the Stern case was an action brought to recover a brokerage commission from a vendor of real property. The plaintiff broker was held entitled to a trial of his allegations that the closing of title did not take place because of the vendor's failure to satisfy certain liens against the property. To like effect is Simon v. Electrospace Corp., 28 N.Y.2d 136 (1971), another brokerage case, in which the Court of Appeals held that "interference with the opportunity of a broker to complete his service does not bar his right to commissions". The rule was said to be:

> "...but a species of the more general doctrine that a promisor is not discharged by the nonperformance of a condition precedent or return promise imposed on the promisee but which the promisor prevented or hindered." 28 N.Y.2d at 142.

All these cases, in other words, assume the existence of a binding contract, from which the parties derived their roles as promisor or promisee. Where, as in the case at bar, the underlying contract is not proved, these cases are inapposite.

The only case BSI cites on an attorney's right to compensation, Sasson v. Ferris, 231 App.Div. 524, 248 N.Y.S. 125 (1st Dept. 1931), is clearly not in point, as the following quotation from the opinion demonstrates:

> "The evidence is clear that Sasson agreed to make this payment in order to prevent the attorneys from ceasing to act for the son, and the attorneys thereupon continued to serve. His was an original promise, which was subsequently confirmed in writing in a statement

> of account prepared by respondents and signed by petitioner." 248 N.Y.S. at 128.

These findings and conclusions are sufficient to dispose of BSI's first cause of action, which alleges the contractual obligations upon which BSI relies. I conclude that BSI has not sustained its burden of proof in respect of those allegations.

I further conclude that BSI has failed to prove a binding and irrevocable contractual obligation, on the part of the Trustees or the Fund, to furnish funds necessary to confirm a Neisco arrangement, irrespective of the overall outcome of the Fund's negotiations with the Horvaths. That conclusion is fatal to BSI's third cause of action.

The second cause of action, sounding in fraud, may be disposed of briefly. There is no proof whatsoever that, at the time of their conversations with BSI, either the Trustees or the Fund knew that they never intended to provide the funds required for confirmation. The evidence is quite to the contrary; in the early stages, the Fund hoped that an arrangement would go through, and that the other matters involving the Horvaths and their companies would be worked out in a manner acceptable to the Fund. In the event, that did not come to pass; but the case is entirely lacking in those elements of falsity, scienter, and intent which are essential to a cause of action in fraud.

IV.

Conclusion

The foregoing constitutes the court's findings of fact and conclusions of law, pursuant to Rule 52(a), F.R.C.P.

The Clerk of the Court is directed to enter a judgment in favor of the defendants, with costs in their favor, to be subsequently taxed.

It is So Ordered.

Dated: New York, New York
January 11, 1977

Charles Haight Jr.
CHARLES S. HAIGHT, JR.
U. S. D. J.

Footnotes

1. The suit was originally filed in Supreme Court, New York County. Defendants removed it to this court.

2. "Masmo" is another Horvath corporation whose financial health was intertwined with the others. "Mr. Rugendorf" is a Fund representative whose role in the drama will be further considered infra.

3. It may be just as well to outline the Horvath corporate empire. Masmo was the holding company, wholly owned by the Horvaths. Its subsidiary, Mount Clemens Corporation, was 78 per cent owned by Masmo and 22 per cent by the public. Mount Clemens in turn had a subsidiary, called Mount Clemens Industries; and Neisco and Montmartre were further sub-subsidiaries.

4. The order of retention, petition, and Itzler affidavit comprise D.Ex.A. The papers refer to the firm of "Ballon, Stoll & Shyman", a predecessor firm to BSI.

5. Arranged in chronological order, they are P.Ex.8, 5, 4, and 16.

6. The latter proposition finds support in 8 Collier on Bankruptcy (14th ed. 1976), ¶¶7-7.5, pp. 941-951, in which it is observed that the statutory powers of a debtor-in-possession "to avoid certain transfers, liens and obligations are of particular importance", p. 941. In re Casco Fashions, Inc., 490 F.2d 1197, 1201 (2d Cir. 1973).

7. In this context, and in keeping with practical reality, BSI must be regarded as the author of both Neisco's petition, which was required to detail any "connections" between BSI and creditors, and the Itzler affidavit.

8. Collier, op. cit. supra n.6, notes that under Bankruptcy Rule 215(a), the successor to General Order 44, an attorney for a debtor-in-possession "can be appointed only upon order of the court, granted upon application stating specified facts", p. 688.

9. The Trustees rely on In re Rogers-Pyatt Shellac Co., 51 F.2d 988 (2d Cir. 1931) (attorneys' application to bankruptcy court for compensation denied on basis of failure to make full General Order 44 disclosure); Albers v. Dickinson, 127 F.2d 957 (8th Cir. 1942) (trustee surcharged for having compensated attorneys without requisite court order); and In re Hydrocarbon Chemicals, Inc., 411 F.2d 203 (3rd Cir. 1969), cert. den., 306 U.S. 823 (attorneys' claim for compensation denied by bankruptcy court for failure to obtain requisite order).

10. BSI is a New York partnership. Its legal services were rendered in New York. In New York "the compensation of an attorney or

counsellor for his services is governed by agreement, express or implied," Judiciary Law, §474. This court, whose jurisdiction derives from diversity of citizenship, looks to New York law for resolution of the parties' contractual rights and obligations. Guaranty Trust Co. v. Yo 326 U.S. 99 (1945); Erie Railway Co. v. Tompkins, 304 U.S. 64 (1938).

11. The statute goes on to qualify the phrase "which is not restrained by law" by certain exceptions, relating to representation of infants, which are not here pertinent.

JUDGMENT APPEALED FROM

Haight, J.

U.S. DISTRICT COURT
FILED
JAN 13 1977
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BALLON, STOLL & ITZLER

Plaintiff

-against-

THOMAS J. DUFFEY, HERMAN A. LEUKING, JR., ALBERT D. MATHESON, WILLIAM J. KENNEDY, JOHN A. MURPHY, JACK A. SHEETZ, JOHN SPICKERMAN, FRANK E. FITZSIMMONS, ROBERT HOLMES, DONALD PETERS, WILLIAM PRESSLER, ODELL SMITH, ROY L. WILLIAMS, FRANK H. RANNEY and JOSEPH MORGAN, not individually, but as Trustees under a common law trust of the Central States Southeast and Southwest Areas Pension Fund.

Defendants

72 Civil 2916 (CSH)

JUDGMENT

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Charles S. Haight, United States District Judge, on September 22, 23, 27 and 28, 1976, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on January 12, 1977, having handed down its memorandum decision, constituting its findings of fact and conclusions of law, and directing the Clerk to enter judgment in favor of the defendants, it is,

ORDERED, ADJUDGED and DECREED: That defendants THOMAS J. DUFFEY, HERMAN A. LEUKING, JR., ALBERT D. MATHESON, WILLIAM J. KENNEDY, JOHN A. MURPHY, JACK A. SHEETZ, JOHN SPICKERMAN, FRANK E. FITZSIMMONS, ROBERT HOLMES, DONALD PETERS, WILLIAM PRESSLER, ODELL SMITH, ROY L. WILLIAMS, FRANK H. RANNEY and as Trustees under a Common Law Trust of the Central States Southeast and Southwest Areas Pension Fund have judgment against plaintiff BALLON, STOLL & ITZLER dismissing the complaint, with costs to be taxed in favor of the defendants.

Dated: New York, N.Y.
January 13, 1977

Raymond F. Burghardt
Clerk

MICROFILM
JAN 19 1977

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

VINCENT PANZA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 2002 ELLIS AVE. BRONX, NYC.

That on the 25th day of MARCH, 1977, deponent personally served the within JOINT APPENDIX, VOLUME II OF II PAGES A-406 to A-837 upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 1 true/copy ~~copies~~ of same with a duly authorized person at their designated office.

~~By depositing ______ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

GREENBAUM, WOLFF & ERNST
Attorneys for Defendants-Appellees
437 Madison Ave.
New York, N. Y. 10022

Vincent Panza

Sworn to before me this

25th day of MARCH, 19 77.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 19~~73~~ 77